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Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~649~~ 36

PUBLIC AFFAIRS ASSOCIATES, INC., ETC.,
PETITIONER,

vs.

VICE ADMIRAL HYMAN G. RICKOVER.

No. ~~739~~ 55

VICE ADMIRAL HYMAN G. RICKOVER,
PETITIONER,

vs.

PUBLIC AFFAIRS ASSOCIATES, INC., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 649 PETITION FOR CERTIORARI FILED JANUARY 14, 1961
NO. 739 PETITION FOR CERTIORARI FILED FEBRUARY 17, 1961
CERTIORARI GRANTED MARCH 20, 1961

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IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,463

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as Public Affairs Press, Appellant,

v.

VICE ADMIRAL HYMAN G. RICKOVER, Appellee.

Appeal From the United States District Court for the District of Columbia

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Appendix to Appellant's Brief—Filed February 10, 1960

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

1. Jurisdiction of this Court is invoked under the Federal Declaratory Judgment Act (Title 28 U.S.C.) Section 2201-2. The plaintiff is a corporation duly organized under the laws of the State of Delaware, and doing business in the District of Columbia and elsewhere. The defendant is a citizen of the United States and a resident of the District of Columbia, and is sued as an individual.

2. On or about the 29th day of October, 1958, the plaintiff, an educational publishing organization, requested of the defendant copies of his public speeches made, delivered and disseminated under the official auspices of the Department of the Navy, in order that the plaintiff might quote from and publish these speeches in book form. The defendant, upon receipt of this request, adjured the plaintiff that it could not use, quote or publish these public speeches for the reason that exclusive rights thereto had been assigned and sold to another publisher.

3. The defendant further, on or about the 11th of December, 1958, in an attempt to restrict the free use of his public speeches, placed under private "copyright" restrictions, one or more of his public speeches.

4. All of the speeches made by the defendant have been made in his capacity as an Admiral of the United States Navy. Such speeches utilized facilities, information and data obtained by the defendant in connection with his duties as a public official. Such speeches, having been released to the public press, the plaintiff alleges, are in the public domain and not subject to any curtailment as to use.

5. The plaintiff alleges that if the defendant may, by the use of an alleged "copyright" or otherwise prevent or restrict the free use of his public speeches by any representatives of the press, the right of the freedom of speech will be seriously curtailed. The plaintiff desires to publish such speeches as have

been made by the defendant. The plaintiff alleges that since the defendant has threatened that such use will result in action designed to restrain plaintiff's use of such speeches, it is entitled to declaratory relief by this Court as to whether the defendant's activities in such restraint are legal.

6. Plaintiff alleges that a serious question of freedom of speech has been raised by the defendant's action and unless this Court grants the relief hereinafter prayed, irreparable damage will be done to the plaintiff and to the public in general.

WHEREFORE, the plaintiff prays this Honorable Court:

1. That the Court enter judgment declaring that the defendant may not restrict the quotation from his public speeches, either in full or in part, in book form or otherwise, once they have been delivered publicly.

2. That the defendant be directed and ordered to remove any "copyright" restrictions on his public speeches.

3. That this Court order a speedy hearing on this action and advance it on the calendar pursuant to Rule 57 of the Federal Rules of Civil Procedure.

4. That this Court grant such other and further relief as may seem just and proper.

ANSWER

First Defense. The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense. The complaint fails to state a claim against the defendant upon which relief can be granted for the reason that there is no actual controversy within the meaning of the Federal Declaratory Judgment Act (Title 28, United States Code, Sections 2201-2).

Third Defense. The complaint fails to set forth an actual controversy within the jurisdiction of this Court warranting the entry of a final judgment or decree.

Fourth Defense. Defendant:

1. Denies knowledge or information sufficient to form a

belief as to the allegations of Paragraph 1 of the complaint except defendant admits that he is a citizen of the United States and a resident of the District of Columbia.

2. Denies the allegations of Paragraph 2 except defendant admits that on or about the 29th day of October, 1958, plaintiff requested copies of two defendant's speeches in order that the plaintiff might quote from and publish such speeches in book form and that defendant in sending plaintiff a copy of such two speeches declined to give plaintiff permission to quote from them.

3. Denies the allegations of Paragraph 3 except defendant admits that he has copyrighted certain of his public speeches.

4. Denies the allegations of Paragraph 4 except defendant admits that some of the speeches made by him incidentally utilized some of the facilities owned by the United States, that all of such speeches utilized information and data known by him as a result of years of study and observation and were written by defendant as and for his own property to expound his personal point of view.

5. Denies the allegations of Paragraph 5 except defendant admits that plaintiff has expressed a desire to publish in book form such speeches as have been made by defendant.

6. Denies the allegations of Paragraph 6.

WHEREFORE, defendant prays that the Court enter judgment: 1. Dismissing the complaint. 2. Awarding to the defendant his costs and attorneys' fees.

SMITH, HENNESSEY & MCDONALD
BY JOSEPH A. MCDONALD
Attorneys for Defendant

STATEMENT OF FACTS

(Arrived at during arguments before Trial Court. See Transcript pp. 17ff)

The plaintiff is a book publisher with offices in the District of Columbia.

The defendant is a Vice Admiral of the United States Navy on active duty as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and is Assistant Director for Naval Reactors, Division of Reactor Development, U.S. Atomic Energy Commission.

The defendant, during the period beginning October 20, 1955 and ending January 16, 1959, the date of the commencement of this action, delivered in public twenty-three speeches prepared by him.

Schedule A (Exhibit 15) attached hereto is an itemized chronological list of such speeches by title, date of delivery, auspices and place of delivery.

The plaintiff advised the defendant *in writing* on or about October 29, 1958, a few days after the twenty-second of the foregoing speeches had been made, that it desired to *quote from two* of the defendant's speeches in book form and requested copies of the twenty-first and twenty-second speeches listed in Schedule A. *Contemporaneous with that request there were telephone conversations between the parties whereby the plaintiff made it clear that he wished to publish the defendant's speeches.*

Schedule B (Exhibit 1) attached hereto is a copy of plaintiff's letter of October 29, 1958 addressed to defendant asking for such copies. Plaintiff's *indication of his desire* to publish the speeches was made orally in a telephone call from Morris B. Schnapper, Executive Director of plaintiff, to defendant shortly after the delivery of the said letter marked *Schedule B.* (Exhibit 1)

Defendant *indicated that he would not grant* plaintiff's request for permission to publish the speeches (a) in such telephone conversation and (b) through E. P. Dutton & Co., Inc., book publisher of New York in a letter dated November 10, 1958, copy of which is attached marked *Schedule C.* (Exhibit 5) Defendant had, on or about July 9, 1958, entered into a contract with said E. P. Dutton & Co., Inc., for the publication of a book then known as "Addresses of Admiral Rickover" based in part on certain of said speeches. A copy of such contract is attached hereto marked *Schedule D.* (Exhibit 16)

On December 1, 1958 defendant filed an application for registration of a claim to copyright in a compilation of the first twenty-two speeches listed in said Schedule A with a preface headed "The Purpose of Education" and bearing on the title page the copyright notice: "H. G. Rickover, Copyright 1958." This application received registration No. A363452-1958. A certified copy of such application is submitted herewith marked *Schedule E**. (Exhibit 17) A copy of such compilation is submitted herewith marked *Schedule E-1**. (Exhibit 6A & 6B)

On December 1, 1958 the defendant also filed an application for registration of a claim to copyright in the speech numbered 23 in Schedule A (Exhibit 15) attached hereto entitled "Education—Our First Line of Defense" prepared for delivery on December 11, 1958 at The Harvard Club of New York. This application received registration No. A363451-1958 and a certified copy thereof is submitted herewith marked *Schedule F**. (Exhibit 18) A copy of such speech is submitted herewith marked *Schedule F-1**. (Exhibit 9)

On January 8, 1959 the book entitled "Education and Freedom", copy of which (but not a first edition copy) is submitted herewith marked *Schedule G**. (Exhibit 19) was published by E. P. Dutton & Co., Inc. An application for registration of a claim to copyright in such book, naming the defendant as copyright claimant, was filed on January 12, 1959 by the publisher E. P. Dutton & Co., Inc., and was given registration No. A371063-1959. A certified copy of such application is submitted herewith marked *Schedule G-1**. (Exhibit 20)

On April 9, 1959 issue was joined by the filing of defendant's answer maintaining that such speeches are, and ought to be held to be, his.

The circumstances under which the said speeches were written by the defendant are summarized in the following paragraphs.

1. Were the speeches written on Admiral Rickover's "own time" or "the Navy's time"?

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* Exhibit is submitted herewith rather than "attached hereto." (Italicized phrasing was added by the Trial Judge during oral arguments pursuant to stipulation by Counsel. See original transcript of proceedings pp. 17-22).

Admiral Rickover has no "regular working hours". Practically every waking hour is devoted to "business." Admiral Rickover's work is done at home, as well as at the office, on planes, trains, and in hotel rooms, wherever he happens to be. If by the Admiral's "own time" is meant that period of the day beyond what might be considered a normal working day of 8 or 10 or 12 hours, the speeches in question were written on the Admiral's "own time". Most of the writing was done at home, some of it was done while traveling, none of it was done at the office.

2. Were the speeches written at the expense of Admiral Rickover or the Government?

The speeches were written by the Admiral in longhand. A large part of the speeches were typed by Mrs. Rickover at home. The typewritten material plus some handwritten portions were brought in to the Admiral's office for the typing of a final copy and the preparation of a multilith master by the Admiral's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on Government duplicating machines.

3. How were the speeches distributed?

All of the speeches were distributed by Admiral Rickover except those numbered 7 and 12 on Schedule A attached hereto which were not distributed by anyone. Certain of the speeches, approximately sixteen in number, were also made available to the press through the Public Information Office of the Department of Defense or of the Atomic Energy Commission, or both. In distributing the speeches, Admiral Rickover mailed some to individuals who had requested copies or who Admiral Rickover believed would be interested in the subject. Some were sent by Admiral Rickover, approximately 50 in each case, to the sponsor of the speech to be made available to the press and others at the place where the speech was to be delivered. Some speeches were sent to the Press Club in Washington by Admiral Rickover for the use of representatives of the press.

4. Were the speeches approved by any branch of the Government?

Each speech was submitted to the Department of Defense,

Office of Security Review, in advance of its release. No objection thereto was received, and each of them was returned to Admiral Rickover bearing the stamp of the Office of Security Review, reading as follows:

"NO OBJECTION TO PUBLICATION ON GROUNDS OF MILITARY SECURITY.

(Here date was stamped)

OFFICE OF SECURITY REVIEW (OASD I. & PA), DEPARTMENT OF DEFENSE."

5. Did Admiral Rickover take leave of any sort in connection with the trips involved in the speaking engagements?

Admiral Rickover did not take leave of any kind in connection with the trips during the course of which he made the speeches. Vice Admiral Rickover as Assistant Director for Naval Reactors, Division of Reactor Development, U.S. Atomic Energy Commission, and Assistant Chief of the Bureau of Ships for Nuclear Propulsion, is required to do a substantial amount of traveling. In addition to supervising the work of a unit of approximately 200 people in the Department of Defense, Admiral Rickover maintains contact with, and visits manufacturing plants, shipyards, and laboratories engaged in various aspects of the production of nuclear propulsion equipment and the design and construction of ships so powered. Admiral Rickover was able to conduct government business at or near the location in which the speech was to be given and arrange to be free for the few hours needed to attend the functions "on his own time". The transportation in every instance was provided by the government.

6. What remuneration was there for the making of the speeches?

In connection with some of the speeches honoraria were offered to Admiral Rickover. In each case Admiral Rickover requested that the amount be paid directly to a specified charity. Several charities, which can be named if it is deemed material, have benefited from these donations. Admiral Rickover has not accepted for himself an honorarium or any other type of payment in connection with any of the speeches.

Schedule H (Exhibit 21) attached hereto is a copy of the partial list of some high-ranking officers in all three services who have published important books while on active duty as incorporated by Senator Symington in his remarks as printed in the Congressional Record of August 31, 1959 on pages 15927 and 15928.

Schedule I (Exhibit 14) attached hereto is a copy of Article 1252 of the United States Navy Regulations entitled, "Disclosure and Publication of Information" as the same is now, and at all time during the writing and publishing of the defendant's material was, in effect.

Schedule J (Exhibit 13) attached hereto is a copy of Department of Defense Directive Number 5230.9 dated August 17, 1957 on the subject of "Clearance of Department of Defense Public Information", Part V of which is headed "Writing For Publication by Defense Personnel, as Individuals."

The complaint alleges that the speeches of the defendant were "made, delivered and disseminated under the official auspices of the Department of the Navy." The answer denies this allegation and, in admitting that "some of the speeches made by him incidentally utilized some of the facilities owned by the United States", alleges that "all of such speeches utilized information and data known to him as a result of years of study and observation and were written by defendant as and for his own property to expound his personal point of view".

The defendant's position is that his superiors and the appropriate agencies or departments of the Federal government knew this and that he did not advise them or his audiences that he was expressing his own personal point of view because he assumed that it was well-known. The defendant admits that it was his practice to have his speeches as prepared for distribution bear his name, his rank in the United States Navy and his title in the Atomic Energy Commission, that the speeches as distributed customarily bore a statement "for release" giving the date and frequently the time of the release and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission.

PROCEEDINGS

OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Frosh: May it please the Court, in this suit for a declaratory judgment the question that is presented for Your Honor's consideration is the question of whether the defendant, Vice Admiral Hyman Rickover, may limit or control the use of his speeches made under the facts and circumstances that will be explained to Your Honor during the course of our arguments by placing upon these speeches a private copyright.

The plaintiff in this case is Public Affairs Press, a private publishing house in the City of Washington, in the District of Columbia. The defendant is Vice Admiral Hyman Rickover, who at all times material to the within suit was the Assistant Director for Naval Reactors of the Division of Reactor Development of the United States Atomic Energy Commission, and Assistant Chief of the Bureau of Ships for nuclear propulsion of the Navy Department of the United States.

Now, if the Court please, I am going to divide my arguments as to the facts and the law, into two divisions: the first covering the speeches delivered by Admiral Rickover up until December the 1st, 1958; and, secondly, covering those speeches delivered by the Admiral after December 1st, 1958.

We think, in the main, that the law covering all these speeches is the same, but there are certain factual distinctions in the preparation and delivery of these speeches, as well as in the mechanics undertaken by the defendant, Admiral Rickover, to attempt to place a private copyright on these speeches that will change some of the law that may be applied by the Court as to these earlier speeches.

Under the Court's direction, when Mr. McDonald and I appeared before you earlier, we have met a number of times to discuss those matters upon which we might agree, and I think that because of Your Honor's direction we have simplified and distilled the factual problems in this case so that, in the main,

they may be agreed, and it will probably not be necessary that there be any testimony taken before the Court this morning.

Mr. McDonald has prepared a statement of facts. In some respects I agree wholeheartedly. There are a few details with which I do not agree, and therefore, while the statement of facts will be presented by him and the Court may consider it as primarily setting forth most of the agreed facts, there are some details I will explain to the Court that we cannot acquiesce in.

However, the exhibits we shall present have been agreed to and we will submit them to Your Honor during our oral presentation.

Mr. Frosh: On October the 28th, 1958, Mr. Morris Schnapper, who is the executive director of Public Affairs Press, wrote to Admiral Rickover, asking him for copies of two recent speeches before the Columbia University Club and the Theodore Roosevelt Association, indicating that he was anxious to quote from these speeches in a forthcoming book.

This letter, or a copy of this letter, is submitted to the Court as Plaintiff's and Defendant's Joint Exhibit No. 1.

Mr. Frosh: On October the 31st Mr. Schnapper received an answer from a Miss J. Scroggins, secretary to Rear Admiral H. G. Rickover, United States Navy, in which the Admiral said: "I regret I cannot give you permission to quote from these speeches because they are to be in a book which will be published in the near future."

Now, I have the original of this letter; however, there are some pencil notations on it and I believe Mr. McDonald has a clean copy of this which we can submit as Plaintiff's and Defendant's Exhibit No. 2.

Mr. Frosh: Concurrent with the letter from Mr. Schnapper and the answer from Miss Scroggins, there were certain telephone conversations between Mr. Schnapper and Admiral Rickover. These are letters dated November the 4th and November the 10th, and finally, another letter of November the 10th from the E. P. Dutton & Company to Mr. Schnapper in answer to his earlier correspondence with Admiral Rickover.

And, if I may, I should like to submit a copy of the November

4th letter from Mr. Schnapper to Admiral Rickover as a Joint Exhibit No. 3.

Mr. Frosh: The letter of November the 11th, 1958, I will submit as a Joint Exhibit No. 4, and the letter from E. P. Dutton Company to Mr. Schnapper dated November 10th, 1958, I will submit as Joint Exhibit No. 5.

Mr. Frosh: The other letters between Mr. Schnapper and the Admiral may be submitted later by Mr. McDonald. We have no objections to their going in, I think, for the moment, they are not material to my argument.

After the exchange of correspondence that is contained in our Exhibits 1 through 5, on or about the first day of December, 1958, Admiral Rickover took to the Copyright Office of the Library of Congress copies of his speeches that had been delivered prior to that time, and together with a preface and a table of contents this collation of speeches with the preface and the table of contents or index was submitted for copyright registration, and we have as a Joint Exhibit the group of speeches that were taken to the Copyright Office.

Now, if the Court please, this collection of speeches should be examined by the Court, together with the copies of the speeches as they were originally prepared. And the reason I say that is simply that the speeches prior to December 1st, 1958, as they were distributed to the members of the press and other members of the public, bore on the first page the imprimatur of the Atomic Energy Commission and/ or the United States Navy, and were contained in part as news releases of either one or both of these agencies.

The speeches, as they were submitted to the Copyright Office, had a front page which was simply a front page containing the speech material but not containing the front page of the governmental departments. And so I am submitting here the copies of the speeches as they were originally distributed, and as Mr. Schnapper has them and as they were later copyright, or attempted to be copyrighted in the Library of Congress. These may be Exhibit 6.

The Court: Why not distinguish between the two groups, calling one 6-A and the other 6-B.

Mr. Frosh: Very well. 6-A will be the group submitted by Mr. McDonald, and 6-B the group that is submitted by the plaintiff.

The Court: Which contains the copy in the original form and which contains the copies as submitted to the Copyright Office?

Mr. Frosh: 6-A contains the copies as submitted to the Copyright Office, and 6-B contains the copies as originally disseminated. Is that correct?

Mr. McDonald: Yes. May I interrupt to say that 6-A is referred to in our statement of facts as Schedule E-1. I think the record will be clear if there is that cross-reference.

Mr. Frosh: Now, it is to this first group of speeches that I address myself and that I indicated to the Court we would distinguish insofar as the speeches delivered after that date. It is the plaintiff's contention that all of these speeches were dedicated to the public and in the public domain, by reason of their distribution, their delivery, prior to December the 1st, 1958, without any attempt on the part of the defendant to register these in the Copyright Office.

Now, we say that it would have made no difference, having attempted to do so, but we point out to the Court that there was not even the attempt to register these speeches in the Copyright Office until December the 1st, 1958. And we say as to these speeches that they were clearly in the public domain and that the effort on the part of Admiral Rickover to copyright these speeches after they already were in the public domain availed him not.

The Court: What placed them in the public domain? I take it that if a person writes something he doesn't thereby place it in the public domain, unless he has it printed and disseminated without contemporaneously copyrighting it.

Mr. Frosh: That is correct.

The Court: What placed these speeches in the public domain, according to your contention?

Mr. Frosh: These speeches, as they will indicate, were delivered before certain bodies that had perhaps requested the Admiral to deliver an address. The speeches themselves were disseminated by the Press Office of either the Atomic Energy

Commission or the Department of the Navy to any and all person who had interest in the speeches.

They were delivered to members of the press, they were delivered to the Press Club, placed on tables and made available for members of the press. There was at no time any restriction as to the use of these speeches for copying, for quotation, or for publication by the Admiral prior to December the 1st, 1958.

* * *

It is for this reason we say quite clearly that these speeches were in the public domain, and we say that the only portion of the material submitted on December the 1st, 1958 for copyright that was subject to copyright, if any was subject to copyright, is that preface and the table of contents that accompanied this collation of speeches.

If I may, I should like to call the Court's attention to the statute itself, Title 17, Paragraph 8, and the regulations of the Copyright Office promulgated thereunder. I have a copy of the regulations in effect as of June 18th, 1959, which provide . . .

Under Section 202.2 of the regulations of the Copyright Office as printed in the Code of Federal Regulations in June of 1959, we find Section A, General, subparagraph (1) with respect to a published work, copyright is secured or the right to secure it is lost at the date of publication, i.e., the date on which copies are first placed on sale, sold, or publicly distributed, depending upon the adequacy of the notice of copyright on the work at that time.

Paragraph 2: "If publication occurs by distribution of copies or in some other manner without the statutory notice or with an inadequate notice the right to secure copyright is lost. In such cases copyright cannot be secured by adding the notice to copies distributed at a later date."

I submit this copy of the regulation for the Court's perusal, and——

The Court: Let me see if I understand your contention correctly. It it your contention that if a person makes a speech and he has mimeographed copies available and they are distributed at the meeting in which he speaks, or immediately after that, and

there is no copyright notice on the mimeographed copies, there is no intention to copyright the mimeographed copy, but the speaker intends later on to publish the speech in printed form, he does so with copyright notice and files a copyright notice, and complies with all the other technical requirements.

Now, is it your contention that by distributing mimeographed copies that he lost his right to copyright the speech in printed form and placed it in the public domain?

Mr. Frosh: It is difficult to answer it by yes or no. I would say technically, under the regulations of the Copyright Office, the answer is yes. However, there are cases and there are circumstances where there is a limited distribution or dedication of the speech, as for example when a person intends distribution to a very definite and limited group of people and restricts the dissemination of his information to this particular group.

We submit to the Court that it is necessary at the time of the delivery or at the time when these speeches are placed for distribution that the author indicate the limitation that he is placing upon the dissemination of his public speech. We say this was not done in this situation.

The Court: Do you have any authorities sustaining your position?

Mr. Frosh: Yes, sir.

In the case of *White vs. Kimmell*, which is from the Court of Appeals of California, 1952, 193 Fed. 2d 744, a limited publication which communicates contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is a "limited publication not resulting in the loss of the author's common law right to his manuscript but circulation must be restricted both to persons or purpose, or it is not a limited publication."

Mr. Frosh: Now, it is on this basis that we say that even if the Admiral's speeches were copyrightable privately, that insofar as this entire group of speeches is concerned, up until December the 11th, 1953, there was no copyright and there was no ability on the part of the defendant to control the use of these speeches by any person who might wish to quote from them, publish, reproduce or print these speeches.

Now, unless the Court has a question on this prior date, that is, prior to December 1st, 1958, I want to now proceed to the speeches that occurred after December the 1st, 1958. And I repeat, that we feel the same principles applies to these earlier speeches that I will outline for the later speeches, but we say that insofar as the earlier speeches are concerned they were not copyrighted and there is no protection, insofar as the Admiral is concerned, in any event.

Now, the speeches that were delivered by Admiral Rickover after December the 1st, 1958, were, in the main, prior to their delivery, submitted to the Copyright Office with a notice which said: "Copyright 1958" or "1959, H. G. Rickover," and the first group said: "No permission required for contemporaneous press use."

The Court: Before you proceed, in what form were they submitted to the Copyright Office; in mimeographed form?

Mr. Frosh: In mimeographed form, I presume. I assume also that the copy that went to the Copyright Office did not contain the front page having the agency on it, and we are not altogeher cerain on these speeches, but I ame sure Mr. McDonald can tell the Court whether these speeches, as well, contained a front page that had the Atomic Energy Commission or the United States Navy stationery, using the United States Navy or AEC stationery.

Now, we say as to these speeches, first that the copyright notice itself was invalid because it was in an unclear notice. It was a notice that could not be interpreted by anybody other than Admiral Rickover, and we say that Admiral Rickover may not be the arbiter as to who is a member of the press that may use these speeches.

We submit to the Court that the word "contemporaneous press use" is a word that may be construed by various members of the press in different ways. We submit that the word "press" is not readily definable by all persons so that it might include in the mind of Admiral Rickover merely the daily newspapers.

It might mean to another person television, or radio. It might mean to another person news magazines. It might mean to another person quarterly, or publications that are issued in

rather infrequent occasions, and certainly historically it would mean persons who are publishing books.

Now, the Admiral apparently wrestled with this problem as to what was meant by contemporaneous use only, because some time later a letter was written to the Admiral by Mr. V. M. Newton, Jr., who was the chairman of the National Freedom of Information Committee of Sigma Delta Chi, a professional journalistic fraternity, and Mr. Newton asked the Admiral what he meant by "contemporaneous press use," and this letter dated April the 24th, 1959, was answered by Admiral Rickover on May the 6th, 1959.

I believer the plaintiff and the defendant have no objection to copies of both of these letters being submitted to the Court.

Mr. McDonald: That is correct.

Mr. Frosh: If the Court please, the letter of Mr. Newton is submitted as Plaintiff's and Defendant's Exhibit 7. The answering letter of Vice Admiral Rickover dated May the 6th, 1959, is submitted as Joint Exhibit No. 8.

Mr. Frosh: The letter of Mr. Newton sought to determine from the Admiral what he meant by this phase "contemporaneous press use only." The Admiral indicated that it did not occur to him that there would be any newspaper interest in using the material after a few days had passed, and, if there should be, "I shall promptly authorize such use. However, in the light of your suggestion I am going to change the expression in the future cases by deleting the word 'contemporaneous' and making it clear that newspapers and news periodicals are free to use the material without any limitation as to time."

Now, obviously the Admiral had trouble with what was meant by "contemporaneous press use" and had no intention of restricting the use of his material to members of the press. We submit again that the Admiral may not determine himself the meaning of "freedom of the press," and that in allowing newspapers and news magazines to use this material freely he was dedicating even this material to the public domain.

Now, we say that it would be difficult to determine whether a publication, as for example the Yale Quarterly, which comes out—or might conceivably come out—some three months after

the delivery of the speech might be restricted in the Admiral's mind from quotation or use of his speeches, and we submit that if a book publisher were printing a book, the day after the Admiral made his speech and wished to quote from his book, that he would be a contemporaneous press user.

Therefore, we say the attempt in the speeches after December the 11th, 1958, to restrict their use was not within the meaning of the case that I have cited to the Court against such a resricted use as would fail or prevent this material from going into the public domain.

And now I proceed to another reason—

[Here there was submitted to the Trial Court the Statement of Facts in the Appendix. Colloquy of Court and counsel omitted.]

The Court: Very well. Now I think we have clarified the record and we know what the facts are on which the Court has to pass.

Mr. Frosh: The Court has some of the facts. I think we have some other exhibits that will further explain the facts, and these will be copies of the speeches since December 1st, 1958.

Mr. McDonald: With respect to that, Your Honor, may I say that I believe the speech of December the 11th ought properly to be considered, but beyond January the 16th I wonder whether we should explore the status of the speeches. This is after the action was commenced.

The Court: Why?

Mr. McDonald: I have no serious objection, except I think the question is presented by the December 11th speech which was individually copyrighted. If Your Honor wishes the others, I do not want to hold them back.

The Court: Is that part of the issues of this case?

Mr. Frosh: Your Honor, strictly speaking, the Court might well say, I believe, that the issues are limited to the date on which this declaratory judgment was sought. However, we feel that the question presented in these later speeches is a very material one to the question that the Court has to wrestle with today.

The Court: Well, now, what is your position, Mr. McDonald?

Mr. McDonald: In view of the fact that there was a change in

the permission at the foot of the speeches after a certain date which I will specify, after this action was commenced, pursuant to the inquiry by Mr. Newton of Sigma Delta Chi, I think it has some bearing and that we are here to get an answer, and therefore let's put them all in.

The Court: Very well. Now, I want to see where the form of this copyright notice appears in the statement of facts, Mr. Frosh.

* * *

Mr. McDonald: It appears in the exhibit identified, three lines from the bottom of page 2, and called F-1 in the statement of facts, Schedule F-1.

* * *

Mr. Frosh: Your Honor, as Exhibit F-1, we have a copy of the December 11th speech as it was submitted to the Copyright Office. And the copyright notice appears on the first page in the lower left-hand corner. This may be Joint Exhibit No. 9.

* * *

Mr. Frosh: Paramount in the determination of this problem, we feel, is the question of whether a man who is a high governmental official and who is requested or invited to speak in his official capacity and who does, in fact, speak in his official capacity, and who on each one of his speeches has prepared and disseminated, indicates his official position in the United States Government, and who prepares these speeches on Government time, at Government expense, and has them mimeographed and distributed through official governmental channels, we feel that to such a person a private copyright ought not, should not, and is not available.

We say this is increasingly true when the subject matter of these speeches is matter that is acquired by such a person in connection with his official duties. And we point to Plaintiff's Exhibit No. 12 as the perfect example of the type of information that, while it did not violate any security restrictions, was in-

formation that could only be available to this man in his official function.

And this is contained in the very beginning of this Shippingport speech where the Admiral quotes from a contract between the United States Atomic Energy Commission and the Duquesne Light Company. We say that the dissemination of public information is in the public interest.

The Court: Now, you made two different statements in the last few minutes; one was much broader than the other. I want to be sure I understand which one you are going to stand on. I understood you first to state that no public official may copyright any speech on any topic whatsoever which he prepared on what you call Government time. I don't know what is Government time, because the 40-hour week for Government employees is very largely fiction. Certainly, it is fiction for the higher echelon. Do you mean to say that—

Mr. Frosh: Let me first read to the Court what the Government says—

The Court: You tell me your position. I want to know what your contention is.

Mr. Frosh: My contention is a high governmental official, or any governmental official who discusses in public matters which pertain solely to or primarily to matters that he is concerned with as a public official may not obtain a copyright as this material on a private basis.

The Court: Then you are limiting what I thought was a much broader statement to utterances relating to the Government official's own work.

Mr. Frosh: Yes. I would not pretend to say that no Government employee may write or speak his views and copyright such views. I think the cases are legion that support this position, and we do not take this restricted position.

We say, however, as I indicated before, that insofar as information is concerned with his primary function, as for example the Court copyrighting his own opinions. This would be something that, of course, the law could not and would not and does not allow.

The Court: The reason it couldn't be done is because the Court

files its opinion in the Clerk's Office. That makes them public property.

Mr. Frosh: But supposing you copyrighted them before you took them downstairs to the Clerk's Office.

The Court: What would say about a book such as many which have been written in recent years, books of reminiscences by generals and admirals? They all deal with matters with which the authors were concerned officially. Is it your contention that those books are improperly copyrighted?

Mr. Frosh: No. Your Honor, I think . . . . that these works, these published works that are Schedule H, are certainly subject to copyright.

The Court: What kind of works are they?

Mr. Frosh: General Bradley's, "A Soldier's Story."

The Court: Yes. I had books of that type in mind.

Mr. Frosh: General Kuter's, "Airmen at Yalta."

The Court: How do you draw the line of distinction?

Mr. Frosh: Your Honor, while the official documents from which part of this information contained in these books was obtained—while these official documents may very well be in the public domain and subject to discussion by any person the author of these works, the addition of his own composition and literary contribution has prepared a document which, because of its popular individual literary composition and contribution by the individual, is subject to copyright. We say that he could not copyright all of the official documents if he were to take them and attempt to do so.

The Court: How do you distinguish that from Admiral Rickover's speeches?

Mr. Frosh: We say that the speeches that were made by Admiral Rickover were not his own contribution on his own time, as well. All of these books, incidentally, or most, were prepared on the individual's own time.

The Court: We do not know that.

Mr. Frosh: Presumably at their own expense.

The Court: Perhaps at their own expense, but we do not know whether it was on their own time.

Mr. Frosh: There has been no challenge to that, so we assume

this must have been. Perhaps they, too, were subject to challenge if prepared at Government expense.

The Court: What would you say about some books that were written some years ago? There were quite a number of them by former members of the Cabinet, like Harold Ickes' Diary, or Morgenthau's Diary. You do not challenge the right to publish those, do you?

Mr. Frosh: I do not.

The Court: How do you distinguish Admiral Rickover's speeches from these?

Mr. Frosh: The Diary of Harold Ickes' came out when he was no longer in the Cabinet, as I recall.

The Court: But apparently they are contemporaneous diaries, kept as Secretary. That is one of the things that presumably adds value to them. They don't represent a recollection of several years after the event.

Mr. Frosh: As to the diary, the various memoranda contained in the diary—the diary itself may very well be in the public domain if it was document available to the public, or should have been—

The Court: What do you say about Morgenthau's Diary? They are supposed to have been written by the Secretary from day-to-day. Is it your contention that because he might have written it on Government time that his diary is in the public domain?

Mr. Frosh: No, I would not say that. Your Honor, there are no cases in this field that I know of—

The Court: But we are in virgin soil, so to speak, and that is the reason I am asking you to state what your contention is.

Mr. Frosh: Your Honor, the writings of these men in their diaries, if it was on Government time, at Government expense, and was concerned solely with their governmental functions and duties, might be seriously challenged, I would think, under the theory of this case.

However, if the person puts together these reminiscenses at a time after they have been collated or written and collects them and publishes them, I think he may very well have a copyrightable right in the literary composition, and it may very well be

that the document itself is the property of the Federal Government or is in the public domain.

The Court: Well, now, aren't Admiral Rickover's speeches within the ambit of your second group? That is, material to which the writer adds his own literary quality and his own personality?

Mr. Frosh: Because he was writing on Government time, at Government expense, on matters concerned entirely or primarily with matters on which he was concerned in his official capacity.

The Court: Let me ask you this: Exhibit 9 is a speech on education?

Mr. Frosh: That is correct.

The Court: That is not a topic with which the Admiral is officially concerned, is it?

Mr. Frosh: Yes, Your Honor. The Department of the Navy has many, many times, and based in part, perhaps, on studies of the Admiral's own departments, gone into the question of the education of our youth and the deficiencies, if any, therein.

The Court: That is not part of the statutory duty of the Navy Department. Education of naval officers is, of course. But here, for example, I note on page 25 of this speech this is a discussion of education in the schools, for youngsters, and he refers to the average child and the talented child. That has nothing to do with his naval work. It is based on matters in which he as a citizen has an interest. Is it not?

Mr. Frosh: Your Honor, on March the 13th, 1959, the Atomic Energy Commission awarded an $11 million contract for research in biology and medicine during 1958. The AEC, on March the 6th, 1959, announced awards of 440 research and development contracts in the fields of physics, chemistry, metallurgy and controlled thermonuclear research.

The Department of the Navy has published such documents as this, entitled, "Stay in School," by the United States Navy. There is information on the regular naval ROTC career program, that the Navy spends a good deal on. There are all types of programs carried out by the Atomic Energy Commission and the Navy in the field of education, because this is a field that both of these agencies are tremendously concerned with.

The Court: Well, proceed in your own way. I do not want to get you off on a tangent.

Mr. Frosh: Now, Your Honor, the Department of Defense by a directive dated August the 17th, 1957, which will be submitted as a Joint Exhibit No. 12-13, contains—is concerned with the clearance of Department of Defense public information. This is Plaintiff's and Defendant's Exhibit 13, and I call the Court's attention to Roman numeral V, writing for publication by Defense personnel as individuals.

* * *

We say that it has always been the policy of the Government to proscribe the private activities of its personnel for private gain when done on Government time and with the use of Government personnel or machinery or facilities.

We say that all of the speeches of Vice Admiral Rickover were prepared with the use of Government personnel and Government facilities, and, in fact, this is admitted in the application for the registration of a claim to copyright in all of the speeches that he Admral submitted to the Copyright Office, where he says as to the name and address of the persons or organizations who produced the copies, typesetters, printers, binders, et cetera, one Theresa Leone, his secretary in the Department of Defense.

We say that all of the materials that have been submitted for copyright to the Copyright Office were materials that were prepared under Government time, using Government personnel, Government facilities and information of the Government used in his official capacity, and that therefore these speeches are not subject to a private copyright for the private property of the defendant.

Now, Your Honor, Mr. McDonald has given me the Navy regulations, and I assume they are the same. I have not read them, but I am willing to stipulate that they are.

Mr. McDonald: This is Schedule I in the statement of facts.

Mr. Frosh: This will be Joint Exhibit No. 14.

Mr. Frosh: Now, Your Honor, it is our contention that the considerations that I set forth in connection with the speeches

after December 1st, 1958, apply equally forcibly to the speeches prior to December 1st, 1958, but we submit that as to the earlier speeches there is not the color of authority to copyright the speeches because they were already in the public domain.

The speeches since that time were handled in a different manner, that is, by securing a copyright prior to their publication or release, but we say this avails the defendant naught because of the considerations I have outlined.

The Court: Let me pinpoint your point, if I may. Precisely what action on the part of the Admiral do you contend placed the earlier speeches in the public domain?

Mr. Frosh: The publication, dissemination of these speeches to the general public without any attempt at the time of delivery to copyright or restrict them.

The Court: You mean when you say "publication," you mean distribution in mimeographed form, the way speeches are distributed very often in this city; is that what you mean?

Mr. Frosh: Yes, sir; just the general wide circulation to any interested party.

The Court: We will take our visual mid-morning recess, and then I will hear you, Mr. McDonald.

The Court: You may proceed, Mr. Donald.

ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. McDonald: May it please the Court, I would like to fill out the list of exhibits at this point. They tie in with the statement of facts, and the first is this Schedule A, Speeches made—a list of speeches made by H. G. Rickover during the period commencing October 20th, 1955, and ending January the 16th, 1959.

The Court: Mr. Frosh, what was the crucial date at which you drew the dividing line?

Mr. Frosh: December 1, 1958.

Mr. McDonald: The significance of that December 1st date, Your Honor, is it was on December the 11th that he made the speech before the Harvard Club in New York City, and that was the first speech which was individually copyrighted, December the 11th, 1958.

Schedule D, referred to in the statement of facts, is a photostatic copy of an agreement between Hyman G. Rickover and E. P. Dutton & Company, Incorporated, dated July 9th, 1958, with respect to the publication of a work then called "Addresses of Admiral Rickover,"—Joint Exhibit 16.

Schedule F, referred to in the stipulation of facts, is a certified copy of the application for copyright registration in the speech delivered before the Harvard Club of New York City on December the 11th. This will be Joint Exhibit 18.

Schedule G referred to at the foot of page 2 of the statement of facts is the Dutton publication referred to in the contract as addresses of Admiral Rickover but published under the title "Education and Freedom," in January of 1959.

Mr. McDonald: Schedule G-1, referred to at the top of page 3 of the statement, a certified copy of the application for copyright in the book is submitted as Joint Exhibit 20.

Schedule H, referred to at the foot of page 5, part of which has already been read into the record, is a partial list of senior military officers who have published books recently. [Exhibit 21.]

* * *

Mr. McDonald: To round out the correspondence, I offer as Exhibit 22, a copy of the letter from M. B. Schapper, Director of Public Affairs Press, to Honorable Gates, Secretary of the Navy, dated December the 9th, 1958; and, as Exhibit 23, a second letter from Mr. Schnapper to Secretary Gates, dated December 10th, 1958; and, as Exhibit 24, the reply from Secretary Gates to Mr. Schnapper dated December the 20th, 1958.

I believe that completes the submission of exhibits referred to in the stipulation. I would like to emphasize that in Mr. Gates' letter of December the 20th, he makes it clear that the Navy's position is that Admiral Rickover obtained his copyright as a private citizen, and I shall now address myself to the law applicable to this very interesting situation.

First, I would like to say with respect to what might be called the technical test of copyright, that there is a slight misconception of the status of a work such as a speech, and the attorney for the

plaintiff has referred to the regulations of the Copyright Office, Article 202.2, with respect to the procedure with respect to copyrighting a book.

Your Honor will note that 202.2, to which reference was made, deals with published material.

I call the Court's attention to Article 202.6, which deals with unpublished material, and a speech, until it is published, is an unpublished work. When a speech is published it is published as a book.

Your Honor is probably familiar with that distinction. I shall not dwell on it, but if you will refer to Article 202.6 of the regulations you will see that provision is made with respect to unpublished material.

The Court: What is that provision, Mr. McDonald?

Mr. McDonald: 202:6 refers to lectures or similar productions prepared for oral delivery, Class C. As I have said, 202 deals with published material. This is not to say that an unpublished work like a speech may not in due course be published as a book. But what I want to emphasize is that the mimeographed copies of these speeches were, as I see the situation, distributed to the press for the assistance of the press in covering the speeches. This is a traditional method of securing adequate coverage, and has grown up in this country, has been well recognized.

I am not aware that it has been judicially tested, but I call Your Honor's attention to the fact that at the top of the first page of the speeches, as delivered to the press, here is the traditional release note for release at 8:00 p.m., Eastern Standard Time, and so forth.

I think a very fair interpretation of that is that it is not intended as a general publication. As a matter of fact, many speakers depart somewhat from their prepared—

The Court: Mr. McDonald, what difference is there in the regulations in respect to speeches and in respect to published material? You say there is a difference. What is the difference?

Mr. McDonald: In order to copyright a speech as a book, you must publish it with notice of copyright. That is, it must be placed on sale or distributed widely under circumstances indicat-

ing that the author intends to distribute it. Now, this is not to say that a man may not do it carelessly.

The Court. But I want to know what the difference in the regulations is on which you reply.

Mr. McDonald: The regulation with respect to books—as counsel for the plaintiff has pointed out, emphasizes that it cannot be distributed widely without losing the exclusive rights in the material. This is also true, I will concede, with respect to a speech which is prepared for oral delivery. You could not distribute it widely without qualification and still retain your rights, because you would have been deemed to dedicate it.

I say that this distribution to the press was a special type of distribution which ought not to be considered a dedication to the public. However, Your Honor, I think that this is not the heart of the problem. I think we should come to the main question, because I will say this further, which might be a substantial concession under some circumstances:

It is very, very clear that by getting a batch of papers together, former speeches and whatnot, and copyrighting that compilation, which is perfectly all right to copyright as a compilation, no one could maintain that the material in the compilation which might have already passed into the public domain for one reason or for another, was thereby revived and brought back into protection.

The copyright on the compilation merely protects the compilation as a collection of materials. And something new in there, something heretofore not published, is protected by the copyright, but something already dedicated is, of course, in the public domain.

Now, with that, I get to the basic question of whether a man in Admiral Rickover's position is entitled to own and control the fruits of his literary effort. I think that he has, and I think that it was desirable that he should be recognized as having such a right, because in this way we will get more of the fruit of the knowledge and experience of our public officials.

The Admiral's interest in the subject of education, as stated in his book, was stimulated by his experience in the Navy. In recruiting scientific personnel for his work on nuclear propulsion no one can say that he is not interested in improving the Naval

Service or working for the advancement of his country's interests.

Naturally, there is a connection between good education and a good Navy and a strong country, and the Admiral has been going around the country hammering on this point for the last three years, and to some effect. I think that this is a perfectly proper corollary to his duties, and the mere fact that he might have violated the strict terms of a Department of Defense directive that personnel are not supposed to use Government paper for their private letters, or to use the Government mimeograph machine if they are going to make a speech in Altoona, I think that that might be called a detail, and it is so characterized in one of the cases which I believe is applicable and to which I will now refer.

A very interesting situation was decided in this Court just 30 years ago, in the case of Sherrill against Grieves, LVII, The Washington Law Reporter, 286. —I beg your Honor's pardon. That case is cited at the top of page 5 of this memorandum of law.

This was a suit brought by Colonel Sherrill who, while he was a Captain in the Army and an instructor at Fort Leavenworth, wrote material on the subject of map reading, surveying, and military sketching. He was apparently an expert in the field, because two of his colleagues use the material, too. One of them, with permission, and one, with other associates, without permission, giving rise to the case reported at this point.

Sherrill, then Captain Sherrill, reduced his notes to writing and planned to write a book, which he later published. He permitted a colleague, Colonel Moss, to use a portion of his work in a book which Colonel Moss was publishing. Moss published the book with suitable credit given to Captain Sherrill, and that book was copyrighted, so nothing was lost by way of dedication to the public.

A little later, and before Captain Sherrill had a chance to have his whole work published, the staff at Leavenworth persuaded him to have part of his notes and writings printed for the use of the officer students at Leavenworth This was done by use of the Government printing press at Leavenworth. It was known as the Leavenworth Press, and it was there for doing any printing that was needed for the progress of the school.

The work, as printed on the Leavenworth Press, was in pamphlet form. It was entitled "Military Sketching," as indicated at the top of page 6 of my memorandum, and it bore a suitable copyright notice in 1910 in the name of C. O. Sherrill.

Later in that year Sherrill incorporated the pamphlet in a book which was duly copyrighted, but then he found out that the defendant Grieves and his publisher colleagues produced still another book and used his material in their book, and then in this litigation, right in this District, claimed that Sherrill didn't own his material because he wrote it while he was an officer working on the instruction of men at Camp Leavenworth. He used the time out there while he was on duty. He had it printed on a Government press, and therefore it should belong to the United States, to the public, to everyone.

But Chief Justice McCoy, sitting in the Supreme Court of the District, said the plaintiff was employed to give instruction, just as a professor at an institution of learning. The Court does not know of any authority holding that he was required to reduced his notes to writing. And in disposing of the defendant's contention that the public had paid for the cost of publication and presumably owned it, he said this contention is, in substance, that by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with him in performing his duties.

If that be so, then neither the plaintiff nor defendant Grieves had any right to copyright their books. The fact is that officers do write such books which are copyrighted and used in Government schools, and such books are found in those libraries.

There is nothing in the present case to show that there was any improper use of Government money when the plaintiff's pamphlet was printed on Leavenworth Press under the arrangement testified to. Such arrangement was made in good faith and Congress appropriated money for the operation of the press for any proper purpose.

However, if the printing of the plaintiff's pamphlet was improper it does not follow that the pamphlet became a Government document except in the mere physical sense.

Now, there is another case that arose some thirteen or fourteen

years later. The answer in that case was the material belonged to the Government. And that is the case of Sawyer against Krole Publishing Company.

Sawyer, not to be confused with ex-Secretary Sawyer—this Sawyer was in the Department of Interior, executive assistant to the Secretary of the Interior from '29 to '33. And in the first of those years he made a trip to Alaska, an inspection trip on official business, and when he returned he asked an employee in the General Land Office of the Department to prepare a map, which he later copyrighted in his own name, Ernest Walker Sawyer. This is dealt with on page 8 of the memorandum, and the difference in the facts is extremely interesting.

As I see it, these two cases represent the marks beyond which a man goes with respect to the employment of certain conduct and procedures. It was the situation in the Sawyer case that the basic map used by the employee Wills in the Department of Interior was a Government map. The information that Wills, an employee of the Department, added to the map was Government information. Sawyer didn't pay him for the work; it was done as part of his general work for the Department.

The map, as I say, was copyrighted in Sawyer's name, and about one year later was added to by the inclusion of certain additional information, information obtained from the Department, and it was in that form republished, and it was republished by the Government. It still bore the original copyright in the name of Sawyer, and Sawyer, in suing Krole, after Krole Publishing used the second map, made it clear he was not trying to protect the additional information; he merely wanted to protect the information that was on the first map, the one which he had copyrighted.

But the Court pointed out that Sawyer was undoubtedly acting in his official capacity in connection with his work in Alaska. The second map came out in a publication, a United States publcaton, called "General Information Regarding the Territory of Alaska."

Sawyer was a member of the Commission which was surveying the possibility of a highway to Alaska, and it was held there was no infringement by Krole Publishing Company, because Govern-

ment time, material and effort was used in the mapping. And I think there is a great distinction between the two cases. I don't disagree with the law in the Sawyer case.

I think if anybody does that sort of work he is really turning out a map at the Government expense. There was no individual contribution by Sawyer to it. He merely returned to the office and asked a subordinate to turn out the map for him.

There is one more recent case which I have not included in the brief, but I mention it just so Your Honor will know that we have not overlooked it, and that is the interesting litigation with respect to the Clark papers of the Lewis and Clark Expedition. Now, this goes way back but there was an excellent opinion written by Judge Nordy out in Minnesota—

The Court: I remember reading it.

Mr. McDonald: This is a case where the leader of the expedition, Merriweather Lewis, Captain, was directly instructed by President Jefferson to keep accurate notes and write a full report of conditions as he found them in the Northwest.

When he returned after several years such a report was filed. Now, Lewis, en route, encouraged his men to keep diaries and notes. Clark kept notes, and Clark, who was Lewis' subordinate, first ranking subordinante, recopied some of his notes so they could be incorporated in Captain Lewis' report to the President.

But then, years later, the original notes of Clark were found and they turned up in Minnesota in somebody's attic and were put in the hands of the Minneapolis, Minnesota Historical Society, and they were valuable, of course, and a subject of great interest, and in determining the ownership of these materials the United States entered the litigation and asserted its rights, claiming that Clark was in the employ of the Government and was carrying out his instructions in going up the Missouri River, and therefore these original notes should belong to the United States.

But Judge Nordby decided against that contention and Circuit Judge Volk affirmed the District Court opinion, and so the matter rests.

I have only one other thing to add on this. The distinction between the Sherrill case and the Sawyer case in very reminiscent

of the litigation in United States against Dubilier Condenser Corporation.

That, of course, was in the field of patents. However, many of the considerations have a bearing, and it seems to me in that case where the Government was finally held not entitled—and I will say it was not unanimously, but, at any rate the Government was held not entitled—to the inventions made by Lowell and Dunmore. It seems to me that Lowell and Dunmore had been given a great deal more direction and Government facilities and time on which to pursue their work than could even be envisioned in the Sawyer case, to say nothing of the Sherrill case.

The Court: Before you go on, have you the citation to the Lewis and Clark opinion?

Mr. McDonald: Yes, Your Honor, I do. It is 251 Fed. 2d. 686, affirming 146 Fed. Supplement 652.

The Court: Thank you.

Mr. McDonald: My reference to United States against Dubilier and saying in that case the Government was unsuccessful in attacking the assignment made by Lowell and Dunmore to Dublier fits in with the Sawyer case and certainly doesn't go as far as the Sherrill case.

That is badly restated, but that is the end of my argument, Your Honor. I wish to point out that if Admiral Rickover didn't do a lot more than Lowell and Dunmore did, then I am mistaken.

The Court: The Court is very well familiar with the DuBilier case.

Mr. McDonald: Does Your Honor have any questions?

The Court: Do you wish to say anything in reply?

Mr. Frosh: No, Your Honor. I think the Court has our positions pretty well—

The Court: Then the Court does wish to ask you a question. As I understand your contention, and I want to be corrected if I do not understand it accurately, your contention is that any literary product of a Government officer prepared in whole or in part on Government time and possibly with the assistance of Government facilities and dealing with a subject which is wholly or partially connected with the duties of the Government officer, is

not subject to copyright at the hands of the Government officer?

Mr. Frosh: That is correct.

The Court: Well, now, does it follow from that that it goes into the public domain? *Why does it not become the literary property of the Government?*

Mr. Frosh: It does not follow that it goes into the public domain. It would be the property of the Government, as we contend.

The Court: If it is the property of the Government, the Government has a right to copyright it; is that not correct?

Mr. Frosh: I would say that is correct.

The Court: If that is so, how would it help your client if the Court concludes that the Government officer has no right to get a copyright under those circumstances?

Mr. Frosh: If the Government does not get a copyright and allows it to be freely available to the press, then my client or any other publisher or any other newspaper might freely use this material. That is all we seek.

Mr. McDonald: I believe it would be well to clarify the situation at this point. We have been a bit remiss in not citing Title 17 of the Code, Section 8, which provides that the United States Government may not copyright its publications.

The Court: Section 8?

Mr. McDonald: Yes:

The Court: I do know that the Government owns a great many patents. Some it has acquired, and others that are patents on inventions made in Government laboratories.

Mr. McDonald: There is a marked difference between the two fields in that respect.

The Court: Well, now, I have Section 8 before me.

Mr. McDonald: At about the middle of the section, Your Honor.

The Court: (Reading.) "No copyright shall subsist in any publication of the United States Government."

Mr. McDonald: Yes. Your Honor has pointed out, the Government does acquire patent rights, usually by having the employee obtain the patent and then have a shop right in the Government.

The Court: Yes, that is one way that the Government does it, but there have been times when Government agencies took the patent outright. I think they used to draw a line of distinction, as I recall it, between the situation of the employee who was hired to invent and whose function it was to develop a particular device. Then, I think the Government might take the patent. Whereas, the other type of case involved devices which were developed by an employee as a result or in connection with his Government work did not include the duties of inventing, and there, some Government agencies allowed the employee the right to patent these works, granting a license or shop right to the Government.

But I overlooked the provision that the Government may not secure any copyright on any publication.

Gentlemen, this is a very interesting and important matter. I am going to set forth my views in writing in a few days.

Mr. Frosh: I would like to add that all United States Government publications are in the public domain.

The Court: I notice there is an exception in Section 8 in respect to certain publications of the Post Office.

Mr. McDonald: Those are black and white reproductions of stamps, Your Honor.

The Court: I see. I was not sure what that related to. The Court is very grateful to both counsel for the very helpful and able presentation of this case, and also for bringing the facts together in the manner in which they have, so that the taking of any testimony was rendered unnecessary.

(Whereupon, at 12:05 o'clock p.m., the above-entitled matter was concluded.)

OPINION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

This is the trial of an action for a declaratory judgment. The case has been submitted on an agreed statement of facts supple-

ment by a number of documents that were introduced in evidence. The suit is brought by a publishing house against a Vice Admiral of the United States Navy, to secure an adjudication that would declare in effect that the defendant has no property right in his speeches; that they are not subject to copyright; that any one is free to publish them at will without paying him any royalty or other compensation; and that he may not cause any person to be restrained from reproducing them, in whole or in part. The basic question presented is whether Government officials have a literary property in their public utterances and publications, and may secure for themselves the benefits of the copyright law and, if so, under what circumstances and to what extent.

The pertinent facts are as follows: The defendant, a Vice Admiral of the United States Navy, occasionally delivered speeches on matters of public interest. Some of them dealt with ideas that the Admiral developed in connection with his activities as a Naval officer. The plaintiff is a publishing house located in Washington, D. C. On October 29, 1958, the plaintiff wrote to the defendant requesting copies of two of his recent speeches indicating that the writer of the letter intended to quote from them in a forthcoming book. The defendant's secretary replied, enclosing copies of the two speeches, but stated that permission to quote from them could not be granted because they were to be included in a book to be published in the near future. The plaintiff responded by letter stating that the speeches were made by the Admiral in his official capacity and that it was not proper to restrict their use in any way. In addition in a telephone conversation with the Admiral, the plaintiff indicated a desire to publish the Admiral's speeches. The defendant's publishers then gave formal written notice to the plaintiff that action would be brought if the plaintiff were to infringe defendant's legal rights.

These exchanges finally led to the institution of the present suit for a declaratory judgment. It is the contention of the plaintiff that since the speeches were made on topics that were the outgrowth of the defendant's Government activities and in part prepared on what the plantiff calls "Government time" and with the aid of Government facilities, he has no literary property in his speeches and may not secure a copyright on them, but that they

are in the public domain and are available without restriction to any one who desires to reproduce them. It is urged by the defendant, on the other hand, that since the writing and delivery of the speeches in question were no part of his official duties, he has a literary property in them to the same extent that any one else has in own utterances, that he may secure copyright protection as to them, and may bar others from disseminating them.

The evidence shows that between October 20, 1955, and January 16, 1959, when this suit was instituted, the Admiral delivered twenty-three speeches on various topics before numerous organizations and groups. Some of the addresses dealt with such subjects as:

"Nuclear Power"

"Metallurgy in Atomic Power"

"The Challenge of Nuclear Power"

"The Naval Revolution"

and similar topics. Others were devoted to the field of education. Some of the titles in this group are:

"The Education of Our Talented Children"

"The Talented Mind—An Opportunity and an Obligation"

"The Balance Sheet on Education"

"Education in the Nuclear Age"

"European and American Secondary Schools—A Comparison."

Mimeographed copies of each of the speeches were generally distributed at or about the time of their delivery to interested persons. Some of them were later published in book form, the book, of course, being registered for copyright. Subsequently to December 1, 1958, the Admiral adopted the practice of placing a copyright notice on mimeographed copies of his speeches, obtaining a copyright on each of his addresses at the time of delivery.

Although Government officers and employees have been the authors of speeches, articles, addresses, pamphlets, books, and other writings on numerous subjects at different times from the early years of the Republic, the question here presented does not appear to have been raised in any reported case decided by any appellate court. In numerous instances the author secured a

copyright on his literary product and presumably received either royalties or other compensation in connection with its circulation, but it does not appear insofar as reported cases are concerned that any publishing house has ever before contented that it is free to re-publish such material without any compensation to the author and without his permission or consent.

Some assistance can indeed be found in litigation involving patented inventions made by Government officers or employees.[1] The two types of property are analogous. Each is intangible. In each instance the property is an idea in its ultimate analysis. To be sure, technically a patent covers not the idea of the inventor or discoverer, but its concrete embodiment. Nevertheless, the embodiment is the product of an idea. So, too, a copyright covers literary form of an idea. True, there is a distinction in the manner in which the Government dealts with patents and copyrights in respect to itself. It frequently obtains patents on developments originating in Government research laboratories. On the other hand, as a matter of policy, it does not secure any copyrights on publications issued by it. The distinction is due to an Act of Congress which expressly precludes the Government from procuring copyrights, but places in the public domain the literary products originally owned by it.[2]

Publications emanating from Government officers and employees may be divided into three categories. The first group consists of publications prepared by a Government officer or employee as part of his official duties and issued by the Government as a public document. In other words in such cases the officer or employee is hired to write for the Government. Countless examples of publications in this class can be found: maps prepared by employees of the Coast and Geodetic Survey and Geological Survey; manuals issued by various Government departments, such as the Manual of Courts-Martial; bulletins of the Department of Agriculture; histories of military or naval operations in which the United States participated, prepared by a Division of Military or Naval History of the Department of Defense and printed and circulated by the Government; and numerous other

1. *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178.
2. 17 U.S.C. §8.

Government publications. Since the author of each of them was hired to prepare the publication and did so as part of his official duties, he has no literary property in the product. It belongs to the Government and because of the above-mentioned Act of Congress falls into the public domain.

The second category involves literary products of Government officers or employees that have no connection what ever with the official activities of the author. For example, a Government officer or employee may write a novel,[3] or a book of poems,[4] or perhaps a book in the field of history, while the author's official duties may be entirely unrelated to the subject. Obviously, in such cases the author has the same literary property in his output that would be true of any other member of the public, and the fact that he happened to be employed by the Government would no more affect his rights than if he were an employee of a private business concern.

The third class lies between the other two. It comprises literary products of a Government officer or employee that have some bearing on, or that arise out of his official actions, although writing the book or delivering the address in question, is no part of his official duties. The defendant's literary products involved in this case are in this group.

Every Government officer or employee naturally owes the utmost loyalty to his employer. He is under a legal and moral obligation to use his best endeavors in the performance of his functions and to utilize all of his abilities, knowledge and experience to that end. On the other hand, no one sells or mortgages all the products of his brain to his employer by the mere fact of employment. The officer or employee still remains a free agent. His intellectual products are his own, and do not automatically become the property of the Government. The circumstance that the ideas for the literary product may have been gained in whole

3. Washington Irving and Nathaniel Hawthorne produced some of their best writings while in the Government service. General Lew Wallace is said to have written "Ben Hur" in the Governor's Place at Santa Fe, while Governor of the Territory of New Mexico.

4. Walt Whitman was a Government employee for a number of years.

or in part as a result or in the course of the performance of his official duties, does not affect the situation.

It is not in the public interest to hamper the intellectual growth of any one, or to interfere with the development of ideas, merely because the person who is uttering them happens to be employed by the Government. So, too, title to literary property cannot be made to depend on such minor considerations, whether any part of the work was done during office hours, whether a Government secretary participated in getting the manuscript ready, or whether a Government mimeograph or multigraph machine was used in preparing copies. If any Government agency objects to such a course, the matter can be dealt with by regulations or other intramural action, but no such circumstances can deprive the officer or employee of title to property which otherwise belongs to him. In this instance, although the Court caused the United States Attorney to be notified of the pendency of this proceeding, and extended an opportunity to Government counsel to appear as *amicus curiae*, the Government did not avail itself of this invitation. Manifestly, it is a fair inference that the Government does not feel that it has any interest in the proceedings and that it does not desire to assert any paramount title, or to claim that the literary product here involved is in the public domain.

In *Sherrill v. Grieves*, LVII The Washington Law Reporter 286, decided by the Supreme Court of the District of Columbia,[5] it was held that an instructor at an Army school who reduced his lectures to writing and arranged for their publication, had a right to secure a copyright on the book, and that the work was not a Government publication or in the public domain.

In the light of the foregoing discussion, the Court reaches the conclusion that literary products in the third category abovementioned, are not in the public domain, but remain the property of the author to the extent to which to common law and the law of copyright otherwise protect him, and that his rights are not affected by the fact that he may be a Government officer or employee. In fact it is in the public interest for the Government to

5. The Supreme Court of the District of Columbia, was a trial court of general jurisdiction and was the predecessor of the United States District Court for the District of Columbia.

encourage intellectual development of its officers and employees, and to look with favor upon their making literary and scientific contributions. It is a matter of common knowledge that this course is followed by private industry. Many scientific articles published in technical journals are written by scientists employed by private concerns and their employers generally encourage such activities. No one would contend that the copyright on such articles would belong to the employer.

The conclusion here reached is supported by the views of the Supreme Court in respect to patents on inventions made by Government employees. In *United States v. Dubilier Condeser Corp.*, 289 U.S. 178, one Lowell and one Dunmore were scientists employed in the Radio Division of the Bureau of Standards. They were assigned to work on certain radio projects as a part of their official duties. In the course of these activities they conceived the idea of devising a radio instrument to be operated by the ordinary house alternating electric current. Previously radio receivers depended on batteries. They proceeded to develop their idea in the laboratories of the Bureau of Standards and with the use of Government material. They finally invented such a radio receiver and embodied it in the form in which it could be manufactured on a practical basis. It became the modern radio receiver of the type used in the home. The obtained patents on their invention and sold them to Dubilier Condenser Corporation. The Government took the position that it was the owner of the invention and brought suit to compel an assignment of the patents to it. The litigation eventually reached the Supreme Court, which held that the invention belonged to Lowell and Dunmore and that, therefore, they had a right to obtain patents on it and to retain title to the patents or otherwise dispose of them. Mr. Justice Roberts, in the course of his opinion, made the following observations:

> "One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment. A term of the agreement necessarily is that what he is paid to produce belongs

to his paymaster. *Standard Parts Co.* v. *Peck*, 264 U.S. 52. On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which th employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent."

The rights of Lowell and Dunmore and their assignee were held limited only by the right of the Government to a "shop-right" or a non-exclusive license.

In the *Dubilier* case, the facts were much stronger against the Government officers than is true of the case at bar. In the former, the invention was made by Government employees in the very field in which their duties were performed. They used the facilities of the Government laboratories and worked during office hours, in order to develop their invention. Nevertheless, the Supreme Court reached the conclusion that the invention was their own property, since making the invention was part of their official duties.

Government officers and employers, as has been stated, have been authors of numerous important and valuable publications from time to time. To endeavor to list many of them would unduly prolong this opinion. A few striking examples, without referring to persons now living, may, however, be of interest. Gideon Wells, Secretary of the Navy during the administration of President Lincoln, kept a series of voluminous diaries which were later published in book form, and which form an important source of material for historians of the Civil War era. The publication was under a private copyright. In our own time, Harold L. Ickes, Secretary of the Interior during the administration of President Franklin D. Roosevelt, kept a daily diary while in office which contained comments on currents events and public men. Again the diaries were published in book form under a private copyright.

Perhaps one of the outstanding literary products of a Government officer is the classical treatise by Admiral T. Mahan on "The Influence of Sea Power Upon History," which is regarded as a permanent authority in its field. It is understood that Admiral Mahan at the time that he worked on the book was a Professor at

the Naval Academy at Annapolis. This work, too, was issued under a private copyright.

A litigation that not only has legal significance but is also of historical and antiquarian interest with a touch of romance, is that relating to the ownership of the original rough notes kept as a basis for a formal diary by Captain William Clark of the famous Lewis and Clark Expedition. The location of these documents was unknown for nearly one hundred and fifty years. After the death of one Sophia V. H. Foster on December 20, 1952, these papers were found in the attic of her home in St. Paul, Minnesota. The documents were located in a desk formerly owned by her father, General John Henry Hammond. The executor of Mrs. Foster's estate brought suit against the Minnesota Historical Society and others to quiet the executor's title to the documents. The United States intervened claiming paramount title to the papers on the ground that they were contemporaneous notes made by Captain Clark from day-to-day during the expedition as part of his official duties. Judge Nordbye of the United States District Court for the District of Minnesota, in a well-considered opinion, reviewing the facts in detail, held that these notes were Captain Clark's personal property; that they did not belong to the Government, and concluded that the claim of the Government to paramount title could not be sustained. *First Trust Co. of St. Paul v. Minnesota Historical Society*, 146 F. Supp. 652. His decision was unanimously affirmed by the Court of Appeals for the Eighth Circuit, *United States v. First Trust Co. of Saint Paul*, 251 F. (2d) 686.

It is finally claimed that of the speeches involved in this case those delivered prior to December 1, 1958, have been dedicated to the public and are in the public domain by reason of the fact that the defendant did not place a copyright notice on any of them, and that he permitted or acquiesced in the distribution of a limited number of mimeographed copies at the meetings at which the speeches were made. It is well established, however, that a restricted distribution of a limited number of copies does not constitute an abandonment of the literary property or a dedication to the public. It does not bar the author from later procuring a copyright when the product is actually published.

In *Werckmeister* v. *American Lithograph Co.*, 134 Fed. 321, 324, 325, this doctrine was formulated and applied by the Court of Appeals for the Second Circuit, in the following manner:

> "Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a 'general publication'. There may be also a 'limited publication'. The use of the word 'publication' in these two senses is unfortunate and has led to much confusion. A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public."
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> "The nature of the property in question in large measure determines the extent of the public right. Thus, in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amounts to a general offer to the public."

The views of the Court of Appeals for the Second Circuit on this point were expressly approved by the Supreme Court in *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 299.

The following cases are to be the same effect: *M'Dearmott Commission Co.* v. *Board of Trade*, 146 Fed. 961, 963; *Bartlett* v. *Crittenden*, 2 Fed. Cas. No. 1,076, 967, 970.

In view of the foregoing discussion, the Court concludes that the plaintiff is not entitled to a declaratory judgment as prayed for, but that the complaint should be dismissed on the merits, as the defendant had a literary property in the speeches and addresses referred to in the complaint.

This opinion will constitute the findings of fact and conclusions of law.

Counsel will submit a proposed judgment.

United States District Judge.
ALEXANDER HOLTZOFF

October 23, 1939.

JUDGMENT

This cause came on to be heard on October 14, 1959 and was argued by counsel and upon consideration thereof the opinion of the Court was filed on October 23, 1959 and now it is ordered, adjudged and decreed that:

1. The complaint is dismissed on the merits;
2. The defendant is awarded his costs;

October 29, 1959

ALEXANDER HOLTZOFF,
UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

Notice is hereby given this 5th day of November, 1959, that Public Affairs Associates, Inc., hereby appeals to the United States Court of Appeals for the District of Columbia for the judgment of this Court entered October 29th, 1959, in favor of Vice Admiral Hyman G. Rickover against Public Affairs Associates, Inc.

STANLEY B. FRESH, Attorney for Plaintiff

[fol. 47]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,463

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as Public Affairs Press, Appellant,

v.

VICE ADMIRAL HYMAN G. RICKOVER, Appellee.

On Appeal From the United States District Court for the District of Columbia

OPINION—Decided October 20, 1960

Mr. Stanley B. Frosh for appellant.

Mr. Joseph A. McDonald, with whom Mr. Edwin S. Nail was on the brief, for appellee.

Before Mr. Justice Reed, retired,* and Washington and Danaher, Circuit Judges.

Mr. Justice Reed, sitting by designation: This is an appeal from the judgment of the United States District Court for the District of Columbia dismissing after trial on the merits a complaint for a declaratory judgment.[1] [fol. 48] Appellant, an educational publishing organization, complained on January 16, 1959, that appellee, an admiral of the United States Navy, refused appellant the right to "use, quote or publish" speeches appellee had made "in his capacity as an admiral." Appellant claimed the right to publish because appellee used the "facilities, information and data obtained . . . in connection with his duties as a public official." Appellant further alleged that the speeches have been released to the public press

* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

[1] Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601.

and therefore "are in the public domain and not subject to any curtailment as to use."

Judgment was sought "declaring defendant may not restrict the quotation from these public speeches, either in full or in part, in book form or otherwise, once they have been delivered publicly"; that "copyright" restrictions on his public speeches be declared removed.[2]

After an answer denying portions of the complaint, an agreed statement of facts was filed. That statement showed that the appellee during the pertinent period was a vice admiral on active duty in the Navy Department as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and Assistant Director for Naval Reactors, Division of Reactor Development, United States Atomic Energy Commission. From October 20, 1955, to the commencement of this action, Admiral Rickover delivered twenty-three speeches in public.[3] Some months prior to

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[2] Jurisdiction and the existence of actual controversy is not contested. 28 U.S.C. § 1338; White v. Kimmel, 193 F. 2d 744 (9th Cir., 1952).

[3] (1) Metallurgy in Atomic Power, October 20, 1955, National Metals Congress of the American Society for Metals; (2) Nuclear Power and the Navy, October 27, 1955, San Francisco Council of the Navy League, the Chamber of Commerce and the Commercial Club; (3) Engineering and Scientific Education, November 22, 1955, the Thomas Alva Edison Foundation, Inc.; (4) Lead Time and Military Strength, January 12, 1956, The Society of Business Magazine Editors; (5) Nuclear Power and the Navy, August 16, 1956, Bellefonte Sesquicentennial; (6) The Education of Our Talented Children, November 20, 1956, The Institute Sponsored by the Thomas Alva Edison Foundation, Inc.; (7) Nuclear Power—Challenge to Industry, January, 1957; (8) The Challenge of Nuclear Power, March 1, 1957, The District of Columbia Council of the Navy League of the United States; (9) The Talented Mind—An Opportunity and an Obligation, March 11, 1957, Westinghouse Science Talent Search Award Ceremony; (10) Energy Resources and Our Future, May 14, 1957, Annual Scientific Assembly of the Minnesota State Medical Association; (11) The Naval Revolution, September 14, 1957, American Legion Naval Affairs Committee; (12) International Communication Award "Christopher Columbus," October 12, 1957; (13) The Balance Sheet on Education, November 22, 1957, The Institute Sponsored by the Thomas Alva Edison Foundation, Inc. at the Engineering Society of Detroit; (14) Revolution at Sea, December 5, 1957, Overseas Press Club;

[fol. 49] the institution of this suit, July 9, 1958, he had contracted with E. P. Dutton & Co., Inc., to publish a book to be known as Addresses of Admiral Rickover, based in part on certain of said speeches. The contract asserted that ownership of the speeches was in Admiral Rickover. On December 2, 1958, the Admiral filed, subsequent to their delivery, an application for registration of a claim to copyright in a compilation of the first 22 of the speeches in question with a copyright notice. The appellee recog-
[fol. 50] nizes that the "compilation did not revive any exclusive rights held in such material prior to" previous publication. The same day appellee filed application for registration of speech No. 23. This last speech was delivered December 11, 1958. On January 12, 1959, a book published by E. P. Dutton & Co., Education and Freedom, based largely on a number of the speeches in controversy, was offered for copyright in the name of Admiral Rickover and registered.

The agreed statement of facts shows that the writing of these speeches was done at home after normal working hours or while traveling. It was agreed:

> "The speeches were written by the Admiral in longhand. A large part of the speeches were typed by Mrs. Rickover at home. The typewritten material plus some handwritten portions were brought in to the Admiral's office for the typing of a final copy and the preparation of a multilith master by the Ad-

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(15) Education in the Nuclear Age, December 6, 1957, Dedication of Nuclear Power Training School; (16) European and American Secondary Schools—A Comparison, March 23, 1958, Fiftieth Anniversary, St. Alban's School; (17) The Truth Shall Make You Free, April 19, 1958, The Inauguration Ceremonies of Polytechnic Institute of Brooklyn; (18) The Meaning of Your Profession, June 14, 1958, Stevens Institute of Technology; (19) Investment in Human Resources, September 25, 1958, Engineers Club of St. Louis; (20) The Meaning of the Nautilus' Polar Voyage, September 29, 1958, Altoona Lions Club; (21) A Common Heritage, October 23, 1958, Columbia University Forum; (22) Theodore Roosevelt—Modern American, October 27, 1958, Presentation, Theodore Roosevelt Distinguished Service Medal; (23) Education—Our First Line of Defense, December 11, 1958, The Harvard Club of New York City.

> miral's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on Government duplicating machines.
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> The defendant admits that it was his practice to have his speeches as prepared for distribution bear his name, his rank in the United States Navy and his title in the Atomic Energy Commission, that the speeches as distributed customarily bore a statement 'for release' giving the date and frequently the time of the release and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission."

After multilithing and at or before delivery, all speeches except Nos. 7 and 12 in footnote 3, supra, were distributed. The statement of agreed facts shows as follows:

> "Certain of the speeches, approximately sixteen in number, were also made available to the press through the Public Information Office of the Department of Defense or of the Atomic Energy Commission, or both. [fol. 51] In distributing the speeches, Admiral Rickover mailed some to individuals who had requested copies or who[m] Admiral Rickover believed would be interested in the subject. Some were sent by Admiral Rickover, approximately 50 in each case, to the sponsor of the speech to be made available to the press and others at the place where the speech was to be delivered. Some speeches were sent to the Press Club in Washington by Admiral Rickover for the use of representatives of the press."

Each speech was cleared by the Department of Defense, Office of Security Review. This was done under § 1252 of the General Regulations of the Navy which, inter alia, provide:

> "3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this

> regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department."

There was also a Department of Defense Directive in effect during the time the speeches were delivered.[4]
[fol. 52] Admiral Rickover had duties of supervision and inspection that could be carried out at or near the various points of delivery, and arrangements were made to make the speeches in free or "off duty" hours. No transportation costs were paid by Admiral Rickover in connection with his addresses. Honoraria, when offered, were paid directly to charities specified by the Admiral.

The District Court in its opinion determined that the addresses listed in note 3 fell into a class of literary productions "that arise out of [the author's] official actions, although writing the book or delivering the address in question, is no part of his official duties."[5] Therefore, the trial court determined these addresses were not gov-

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[4] "V. *Writing for Publication by Defense Personnel, as Individuals.* Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD (PA), for review and clearance to avoid any possible violation of military security." DOD Directive No. 52,309, Aug. 17, 1957.

[5] 177 F Supp. 601, 604.

ernmental publications. It was also held that the issue of the press releases and the delivery of the speeches were not "an abandonment of the literary property or a dedication to the public."[6]

I.

Underlying an analysis of the respective contentions of the parties here is the legal right of an author of books, lectures or addresses in his unpublished writings. Copyright, the exclusive right of an author to publish for a limited time his work, did not exist at common law even though at common law an author had a property right in his unpublished work.[7] This property right en- [fol. 53] abled an author to control the disposition of his work until such time as he released it to the public. If this right of control had not ended with publication, there would have been no need of copyright protection. The property right would have been perpetual. The problem of balance between the rights of authors to the fruits of their efforts and the right of the public to have opportunity for learning or diversion was solved by adoption of the copyright acts.[8] Although after publication the rights of authors in the United States are now measured by the Copyright Act, their common law right to the first publication has been preserved.[9] We have not depended pri-

[6] Id., at 606.

[7] Mazer v. Stein, 347 U. S. 201, 214-15; Wheaton v. Peters, 8 Pet. 591, 657, 662; White Smith Music Co. v. Apollo Co., 209 U. S. 1, 15, 18-20 (concurring opinion). The weight of the English cases supports this view. See Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.); Donaldson v. Beckett, II Brown 129, 1 Eng. Rep. 837 (1774 H.L.); Jefferys v. Boosey, 4 H. L. Cas. 815, 961 (1854); Copinger and Skone James, Copyright (9th ed., 1958) 2, 16.

[8] See Holmes v. Hurst, 174 U. S. 82, 85.

[9] 17 U.S.C. § 2: "*Rights of author or proprietor of unpublished work.* Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

marily upon the flexibility of the common law in the development of copyright. This right to choose the time and manner of releasing to the public the labor product of the mind protects against literary piracy.[10]

Speeches and lectures for oral presentation may be copyrighted under the Copyright Code.[11] Their texts, of [fol. 54] course, may be copyrighted as writings under § 4.[12] Were the Admiral a private citizen, therefore, no substantial question would exist as to the susceptibility of these works to statutory copyright. The cases make it clear that an author's common law copyright may exist in lectures and other works that are performed as well as in writings.[13] Our consideration turns first to whether the lectures' general susceptibility to copyright is affected by the Admiral's status as a high government official and the nature of the material discussed. Narrowly stated in terms of the statutory provisions, were these speeches or their written texts publications of the United States Government in which, under § 8 of the Code, no copyright shall subsist.

In the present case Public Affairs Press asserts first, that as these speeches "resulted from his official responsibilities" they should be classified as a "publication of the United States Government" under 17 U.S.C. § 8, which provides, "No copyright shall subsist in any publication of the United States Government."[14] This generalization creates a sea of troublesome questions. Such publications range from the Presidents' messages on the State

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[10] Exploitation of the work of others has been not infrequent in England and the United States. See Dickens v. Hawksley, [1935] 1 Ch. 267, 287; Macmillan & Co. v. Dent, [1907] 1 Ch. 107; Holmes v. Hurst, 174 U. S. 82; Mifflin v. R. H. White Co., 190 U. S. 260; Mifflin v. Dutton, 190 U. S. 265.

[11] 17 U.S.C. § 12.

[12] 17 U.S.C. § 4: "The works for which copyright may be secured under this title shall include all the writings of an author."

[13] Ferris v. Frohman, 223 U. S. 424, 430; Nutt v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929).

[14] This provision appeared as § 7 of the 1909 Copyright Act, 35 Stat. 1077.

of the Union, the Congressional Record, departmental pamphlets, maps, regulations, and judicial decisions to forms for the moving of admission to the bars of the various courts. Apparently the language of the provision originated in the Act for Public Printing, 28 Stat. 601, [fol. 55] § 52.[15] It is designed to achieve in a democracy that depends upon accurate public knowledge the broadest publicity for matters of government. No clarification of the meaning of "publication of the United States Government" appears in the Rules and Regulations of the Copyright Office.[16] The provision grew out of a "confused entanglement" over the sale of the stereotype or electrotype plates desired by Representative James D. Richardson for use in a publication "prepared, compiled and edited by him on behalf of the Joint Committee on Printing."[17]

The language of the original statute on printing—"No . . . Government publication shall be copyrighted"—seems to refer to a publication actually produced by the Public Printer.[18] The Printing Office provision seems to mean, if read naturally, "produced in that office."[19] The Copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by govern-

[15] See the discussion in Berger, Copyright in Government Publications, in Copyright in Certain Works, General Revision of the Copyright Law, Copyright Office, Study No. 21 (A-C), p. 4 (1959).

[16] 37 C.F.R. § 201.1-201.8 (1960).

[17] I Messages and Papers of the Presidents I, II, III (1913 ed., Bureau of National Literature) copyright 1897 by James D. Richardson. See Stuetel, Piracy in High Places, in ASCAP Copyright Symposium No. 8, p. 3, 25 (1957).

[18] See S. Rep. No. 1473, 56th Cong., 1st Sess.

[19] S. Rep. No. 1473, supra, p. 2:

"The Committee on Printing will not undertake to discuss the legal question here involved further than to say that the prohibition contained in the printing act was intended to cover every publication authorized by Congress in all possible forms, . . ."

[fol. 56] mental authority.[20] The second section of § 8 protects authors' copyrights against governmental use of copyrighted material.[21]

Both ordinary practice[22] and the decided cases support our conclusion.[23] Before any enactment as to governmental publication, the Supreme Court declared that federal judicial opinions as such, "published under the authority of Congress," were not copyrightable.[24] The Court returned the *Wheaton* case to the trial court, however, for determination of whether Mr. Wheaton had complied with copyright as to his own notes on the cases.[25] That action recognizes the right, outside of statutory allowance or negation, of a governmental employee to copyright comments on non-copyrightable governmental publications. In [fol. 57] *Sherrill* v. *Grieves*, 57 Washington Law Rep. 286, 290 (Sup. Ct. D. C. 1929), an author's copyright on a pamphlet previously published by a governmental school for officers for use in local instruction with the author's con-

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[20] It would not seem to us that occasional use of a governmental secretary for transcribing or of multilithing machines for copies for publicizing the speeches would fall under the statutory concept of a publication by or at the cost of the United States.

[21] "The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor."

[22] See the list of fifteen senior military officers who, while on active duty, were said to have published books relating to military experiences. 105 Cong. Rec. 15927-15928 (daily ed., Aug. 31, 1959). See 7 Decisions of Comp. Gen. 221, 223.

[23] See a thorough note on this case below, 60 Col. L. Rev. 398 (1960); 73 Harv. L. Rev. 1219 (1960). See a discussion of cases 24 Geo. Wash. L. Rev. 423, 443-447 (1955-56).

[24] Callaghan v. Myers, 128 U. S. 617, 649; Wheaton v. Peters, 8 Pet. 591, 668.

[25] Callaghan v. Myers, supra, at 650. See Mr. Justice Story on circuit in Gray v. Russell, 1 Story 11, 20-21, 10 Fed. Cas. No. 5728, p. 1035, 1039 (C.C.D. Mass., 1839).

sent was upheld against the contention that it was a governmental publication. The author was a government employee but the writing of the pamphlet was outside his employment. In *Sawyer* v. *Crowell Pub. Co.*, 46 F. Supp. 471 (D.C.S.D.N.Y. 1942), the court dealt with a map produced by government employees in the course of their duties, copyrighted by one employee and then published by the Government with notice of that copyright registration. The court held that as the map "relates directly to the subject matter of the plaintiff's work" and was printed and engraved by the Government, the attempted copyright inured to the employer's benefit. Compare *United States* v. *First Trust Co. of St. Paul*, 251 F. 2d 686 (8th Cir. 1958), an action to quiet title, where it was held that a book of notes of exploration kept by Col. Clark was a private journal. He was an army officer, a member of the Lewis and Clark expedition, but Lewis was the commander. Lewis was instructed to keep notes by President Jefferson. This he did. Lewis also sent Clark's notes for the perusal of the President but with comments and directions that caused the court to hold they were to be treated as private notes rather than official, as Lewis' were. As the Clark notes were not shown to be kept in accordance with Clark's duties, the court held them not to be the property of the Government.

It cannot be properly said, as appellant asserted, that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions. If they are statements called for by his official duties or explanations as guides for official action, they are barred from a copyright. A perusal, [fol. 58] even of the titles and the places of delivery alone, should be sufficient to show that these addresses were not governmental publications in that sense. The speeches themselves bear out this statement. We hold that none of these papers is a Governmental publication.

II.

The next question is whether Admiral Rickover has forfeited his right to a copyright on the twenty-two addresses delivered before December 1, 1958.[26] The Copyright Act, § 8, so far as here important, provides, "No copyright shall subsist in the original text of any work which is in the public domain." The manuscript is the private property of an author until publication with all the attributes of ownership within the concept of personal property.[27] This right of authorship is lost—no doubt often inadvertently—when the owner puts his work in the public domain by publication without obtaining a copyright. The right of authorship becomes a copyright with similar individual privileges for the owner by publication and the affixation of the copyright notice.[28]

The only United States statutory definition concerning publication is not directly applicable. It is § 26 and applies to § 24 as to duration of copyright. It does give some indication of congressional thinking on the subject. It reads as follows:

> "In the interpretation and construction of this title 'the date of publication' shall in the case of a work [of fol. 5] , of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority. . . . "

"Public distribution" is the phrase of importance in this case. In England there is a statutory definition in the 1956 Copyright Act, § 49(2)(c):

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[26] The word "forfeit" is adopted to avoid "dedication" or "abandonment" which seem to suggest purposeful release to the public. The purpose of a statutory "publication" is immaterial. National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 598 (2d Cir. 1951); Nimmer, Copyright Publication, 56 Col. L. Rev. 185, note 4 (1956).

[27] Ferris v. Frohman, 223 U. S. 424, 434; 17 U.S.C. § 2, note 9, supra.

[28] 17 U.S.C. § 10.

> "subject to the preceding paragraphs, a literary, dramatic or musical work, or an edition of such a work, or an artistic work, shall be taken to have been published if, but only if, reproductions of the work or edition have been issued to the public;" Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74.

An authoritative English textbook states the rule as follows:

> "Prima facie a literary, dramatic or musical work, or an edition of such a work or an artistic work, is published if, but only if, reproductions of the work have been issued to the public . . ." Copinger and Skone James, Copyright, (9th ed., 1958), p. 21, 30.

In determining whether publication forfeiting the author's power to copyright the addresses has occurred, we must consider the intent of Congress to induce publication for general use by allowing a limited monopoly to enable authors to profit from their writings and the congressional enactment, § 8, which permits a copyright only when the writings have not been put into the public domain, that is, voluntarily released to the public by the author. The Supreme Court has said, a propos of a similar situation: "Such forfeitures are never to be inferred from doubtful language."[29] Nor should they be inferred from doubtful actions. A liberal attitude in protecting any work in its passage from the perpetual but non-productive absolute common law rights of an author to the limited but productive monopoly of the copy- [fol. 60] right is enjoined upon the courts by the purposes of the Copyright Act. However, an author's intent as to publication should not be given controlling weight against the effect of his acts.[30]

The agreed facts stated at pages 3 and 4, supra, show a wide distribution not only to the press but also to people generally who desired copies through interest in the

[29] Washingtonian Co. v. Pearson, 306 U. S. 30, 42.

[30] Cf. Roberts, Publication in the Law of Copyrights, ASCAP Copyright Law Symposium, No. 9, p. 121.

subjects of the addresses. The handling of the addresses prior to December 1, 1958, when copyrighting was first attempted, indicates a studied effort not only to secure publicity for the contents of the addresses through the channels of information, but to go beyond customary sources of press or broadcasting in distributing the addresses to any interested individual. Publication, for measurement of the duration of a copyright, dates from a sale or when "publicly distributed" by the owner of the copyright.[31] Such a measure for the meaning of publication for release of authorship rights seems most consistent with the Act.

In *American Visuals Corp.* v. *Holland*, 239 F. 2d 740 (2d Cir. 1956), Judge Frank writing, it was held that a distribution of several hundred copies of an advertising scheme to prospective customers, apparently with suitable notice of copyright claim under § 10 of the Act, was sufficient publication to comply with the statutory requirement of publication for copyright.[32] Even though we follow the preceding opinion's suggestion that publication to gain a copyright requires less evidence of publication than publication to lose a common law property right, we have been unable to conclude that the distribution of almost [fol. 61] all of his addresses was not a dedication to public use. This makes it unnecessary to consider whether the oral presentation alone would or would not be a publication under the Copyright Act.[33]

An important case from this Circuit, *Hirshon* v. *United Artists Corp.*, 243 F. 2d 640 (1957), discusses publication. Twenty-five hundred copies of a song were distributed in order to publicize it, p. 645: "All the record shows is that 2,500 copies of appellant's song were printed and

[31] 17 U.S.C. § 26, supra, p. 10.

[32] "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; . . ." 17 U.S.C. § 10.

[33] Cf. Ferris v. Frohman, 223 U. S. 424, 430; *Nutt* v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929); Nimmer, Copyright Publication, 56 Col. L. Rev. 185, 194-197 (1956); Kaplan, Publication in Copyright Laws, 103 U. Pa. L. Rev. 469, 473-479 (1955); Selvin, Should Performance Dedicate?, 42 Calif. L. Rev. 46 (1954).

that some [2,000] of them were distributed to broadcasting stations and professional musicians for 'plugging' purposes, chiefly through Broadcast Music Incorporated, named on the copies as a licensing agent. Not a single copy was sold. No license or other permission was given to anyone to perform or otherwise use the song. Nothing was said or done, beyond the described distribution, to give any recipient of a copy the impression that he could make any use of it without first obtaining the proprietor's license through the stated licensing agent." This was held a limited publication which did not vitiate the copyright.

The agreed statement of facts in the case under consideration shows no effort to limit distribution of the speeches delivered prior to December 1, 1958, but rather a willingness to make them available to all who might be interested. Certainly when all of Admiral Rickover's acts of distribution are considered together—performance, distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches—it is difficult to avoid the conclusion [fol. 62] that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain. There is no effort shown to protect the author's private right in any way, no limitation upon who might obtain copies. That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, "All claims to copyright waived." See *White* v. *Kimmel*, 193 F. 2d 744 (9th Cir. 1952).

Since the distribution was not limited in any way to a particular group, no question exists in this case as to the extent of any limitation so as to avoid "publication" in the copyright sense. Anyone was welcome to a copy.

Nor do we have any problem as to limited use of the addresses by the press for fair comment. The press was free to use the speeches in whole or in part for their news value. But such ephemeral use is far different from the unlimited distribution to anyone who was interested which is manifested by the agreed statement of facts.

It is the complete absence of limitation on the use of the printed distributions by anyone at any time which destroyed the common law rights of the author.

III.

Copies of the speeches delivered after December 1, 1958, bore this sort of notice: "Copyright 1958, H. G. Rickover. No permission needed for contemporaneous press use. Above copyright notice to be used if most of speech reprinted." Copies of these speeches were deposited in accordance with the act. The appellant does not appear to contend that this notice does not contain all the formal elements required by § 19 of the Code. Rather, it asserts that these notices do not comply with the act because, in addition to the required elements, they also contain a conditional permission to use the work. Appellant contends that the terms of this condition are vague, particularly "contemporaneous" and "press", and for this [fol. 63] reason the entire copyright is invalid. No authority is cited for these contentions. The argument fails to distinguish between a valid and sufficient notice followed by additional, perhaps questionable, limitations and a notice which fails to comply with the specific requirements of § 19. There is not much merit to appellant's contention that the condition is vague or improper, but in any event the existence of the admittedly valid notice preserves all rights and the contemporaneous granting of limited permission to use the work, whether valid or not, has no effect on the validity of the underlying and fully preserved right.

A question is raised as to fair use of these later addresses in compilations or in quotation or criticism. This is a suit for declaratory judgment, and appellant has not presented a copy of the book or pamphlet it intends to publish. Nor has it otherwise unambiguously indicated just what use it plans to make of these later speeches. Without the planned use before the court, it is, of course, impossible to determine whether it is fair. Appellant's prayer for relief below indicates, however, that it wants to be able to use these speeches "either in full or in part,

in book form or otherwise." Insofar as that prayer asks for a declaration that the doctrine of fair use will justify publication as a book of verbatim copies of some of these speeches, the matter is put with sufficient definiteness to permit an answer. The publication of a work consisting in substantial part of quotations from another copyrighted work is not permitted under the theory of fair use.[34] If less than the whole text of the speeches is taken, the competitive effect of such a publication by the appellant on the similar work published in compliance [fol. 64] with the Admiral's copyright would be a relevant factor.[35] The question as to the fair use of the addresses copyrighted after December 1, 1958, is left to the District Court on remand.

The record shows that there are some of the addresses to which our holding may not be applicable. Copies of No. 23, Education—Our First Line of Defense, bore a copyright notice that is sufficient to protect it from use by others under § 10 of the Act. Nos. 7, Nuclear Power—Challenge to Industry, and 12, Christopher Columbus, are said not to have been distributed to the public as the others were.

In these circumstances, we conclude it is better to reverse and remand to the District Court for further hearing and application of this opinion.

It is so ordered.

WASHINGTON, *Circuit Judge, dissenting*: I would affirm the judgment of the District Court. I do not believe that the dissemination of the 22 speeches delivered prior to December 1, 1958, was such as would defeat the author's common law right of first publication. They were therefore not in the public domain when Admiral Rickover filed his application for registration of the speeches in compiled form under Section 12 of the Copyright Act, 17 U.S.C. § 12 (1958). Consequently, nothing in Section 8

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[34] See Folsom v. Marsh, 9 Fed. Cas. No. 4901, p. 342 (C.D. Mass. 1841); Toksvig v. Bruce Pub. Co., 181 F. 2d 664 (7th Cir. 1950); Yankwich, What is Fair Use?, 22 U. Chi. L. Rev. 203 (1954).

[35] See 56 Col. L. Rev. 585, 593, 597 (1956).

of the Act would bar the validity of the copyright thus secured, both as to the compilation and as to the individual speeches contained in it.

It is clear that Admiral Rickover intended to foster [fol. 65] the widest public dissemination of his words—as current news—for the sake of advancing his own views and programs. But I think that it is equally clear that he meant to preserve, and actually did preserve, the exclusive right to publish the speeches in compiled form after their immediate news value had passed away. Speeches of men in the forefront of public life are unique among literary products. Not only are they often works of considerable literary merit, but they may also be "news" of the first importance. As "news" they deserve the widest unfettered contemporaneous dissemination. Where, as here, an author seeks to advance this end by making copies of his speeches available to the press and other interested persons, he is serving the public's interest as well as his own. But insofar as they have a commercial value as literary works after their immediate news importance has passed, they belong appropriately to their creator. The public interest in the news value of the author's work may cut across or postpone his rights; but that is not to say that it extinguishes them.[1]

In my judgment the rule which requires a publication to be "limited" to avoid forfeiture of property rights in the material published is wholly inapposite here.[2] There

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[1] *Cf.* Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556 (D. Mass. 1928), dealing with a copyrighted magazine article which was also "political 'news' of the most important character," *id.* at 557. Such a copyright, in my view, should be no bar to bona fide contemporaneous quotation by the press, whether or not express permission to copy is given.

[2] This test is characteristically invoked where there has been a prepublication circulation of a literary or musical work for promotional purposes, *e.g.*, Hirshon v. United Artists Corp., 100 U.S.App.D.C. 217, 243 F.2d 640 (1957); Ilyin v. Avon Publications, Inc., 144 F.Supp. 368 (S.D.N.Y. 1956). It is sometimes said that dissemination must be limited to some ascertained group or class, White v. Kimmell, 193 F.2d 744 (9th Cir. 1952), but even this requirement has been subject to qualification. See Werck-

[fol. 66] can be no limited publication of "news"; "news" as such is everyone's property. Compare *Chicago Record-Herald Co.* v. *Tribune Association*, 275 Fed. 797, 798 (7th Cir. 1921). But what remains, after the news value of the words has passed, should belong exclusively to the author, or his assignees. The people who will buy a compilation of Admiral Rickover's speeches, months and even years after they have been reported in the press, will do so because they prize the fruits of the author's intellectual and literary efforts. There is nothing in the law which would compel this court to deprive the creator of the right to reap financial benefits from these efforts because, at the time of their creation, they had the added virtue of being newsworthy events of immediate public concern. Nor is there anything in the law which compels us to attach such a consequence to acts taken by an author to communicate to members of the public that element in his works which is properly theirs. It is a very grave matter for a court to pronounce the forfeiture of an author's intellectual property. I cannot conclude that such a result is warranted here.

The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the [fol. 67] speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail.

Clerk's Certificate to foregoing paper (omitted in printing).

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meister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904). It is evident from these cases, and others treating the same questions, that the notion of "limit" rests upon the assumption that it is within the power of the author to prevent any circulation of his work. When he permits some dissemination, it becomes pertinent to inquire into his motives, to examine the extent of the distribution, and to consider the character of the recipients. Dissemination which is deemed too widespread is punished by forfeiture. Such inquiries, in my view, are quite irrelevant in the case of a leading public official, whose pronouncements on public matters should have—and are intended to have—wide dissemination as news.

[fol. 68] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,463

September Term, 1960

Civil 116-59

PUBLIC AFFAIRS ASSOCIATES, INC., t/a Public Affairs Press,
Appellant,

v.

VICE ADMIRAL HYMAN G. RICKOVER, Appellee.

Appeal From the United States District Court
for the District of Columbia

Before: Mr. Justice Reed, retired, and Washington and Danaher, Circuit Judges.

JUDGMENT—October 20, 1960

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further hearing and application of the opinion of this Court.

It is further Ordered by the Court that appellant herein recover from appellee its taxable costs on this appeal, and have execution therefor.

Per Mr. Justice Reed.

Dated: October 20 1960

Separate dissenting opinion by Circuit Judge Washington.

[fol. 71] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 72]

SUPREME COURT OF THE UNITED STATES

No. 649—October Term, 1960.

PUBLIC AFFAIRS ASSOCIATES, INC., ETC., Petitioner,

v.

VICE ADMIRAL HYMAN G. RICKOVER

ORDER EXTENDING TIME IN WHICH TO FILE A CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI—January 17, 1961

Upon Consideration of the application of counsel for the respondent,

It Is Ordered that the time for filing a conditional cross-petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 17th, 1961.

Earl Warren

Chief Justice of the United States

Dated this 17th day of January, 1961.

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 649—October Term, 1960

PUBLIC AFFAIRS ASSOCIATES, INC., ETC., Petitioner,

vs.

VICE ADMIRAL HYMAN G. RICKOVER

ORDER ALLOWING CERTIORARI—March 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 739 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 739—October Term, 1960

VICE ADMIRAL HYMAN G. RICKOVER, Petitioner,

vs.

PUBLIC AFFAIRS ASSOCIATES, INC., ETC.

ORDER ALLOWING CERTIORARI—March 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 649 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 75]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 1

October 29, 1958

Admiral Hyman Rickover
U. S. Navy Department
Washington 25, D. C.

Dear Admiral Rickover:

Is it possible to obtain copies of your recent speeches before the Columbia University Club and the Theodore Roosevelt Association? I am very anxious to quote from them in a forthcoming book.

Sincerely yours,

M. B. Schnapper
Executive Director

MBS/w

[fol. 76]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 2

October 31, 1958

Mr. M. B. Schnapper, Executive Director
Public Affairs Press
419 New Jersey Avenue, S. E.
Washington 3, D. C.

Dear Mr. Schnapper:

Admiral Rickover has asked me to reply to your letter of October 29, 1958.

I am enclosing copies of the two speeches that you requested. I regret I cannot give you permission to quote from them because they are to be in a book which will be published in the near future.

Sincerely yours,

J. Scroggins, Secretary to
RADM H. G. Rickover, USN

[fol. 77]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT 6B-1

UNITED STATES
ATOMIC ENERGY COMMISSION
Washington 25, D. C.

Tel. ST 3-8000
Ext. 307

FOR RELEASE AT 6:00 P.M. (EST)
THURSDAY, OCTOBER 20, 1955

Remarks Prepared by Rear Admiral H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U.S. Atomic Energy Commission
For Delivery at National Metals Congress of the —
American Society for Metals
Benjamin Franklin Hotel, Philadelphia, Pennsylvania
October 20, 1955

"METALLURGY IN ATOMIC POWER" *

Chairman Strauss of the Atomic Energy Commission was to have spoken to you tonight. He has asked me to express his regrets that he is not able to be here. Also, he has asked me to tell you that he recognizes the important role your organization plays in supporting and extending our country's atomic energy program.

I cannot give you the broad view of our program that Mr. Strauss would have presented. But I do appreciate this opportunity to speak to you because we have major problems in the use of metals in the application of atomic energy to the propulsion of ships and I am sure you can help solve them.

The successful operation of the NAUTILUS assures the application of nuclear power to many other naval vessels. Such application must be based on sure knowledge of all aspects of nuclear power plants, including materials performance.

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* Title used for copyright purposes.

[fol. 78]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 6A

NEWS RELEASE — DEPARTMENT OF DEFENSE

PLEASE NOTE DATE — OFFICE OF PUBLIC INFORMATION

Washington 25, D. C.

(Emblem—Department of Defense)

FOR RELEASE AT 11:00 A.M. (PST)

THURSDAY, OCTOBER 27, 1955

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U. S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
For Delivery at Luncheon Sponsored by
The San Francisco Council of the Navy League,
The Chamber of Commerce, and
The Commercial Club
Merchants Exchange Building
San Francisco, California

October 27, 1955

NUCLEAR POWER AND THE NAVY

I appreciate this opportunity to talk to you on Theodore Roosevelt's birthday because he, more than any other man, helped to mold our Navy into a highly mechanized and effective instrument of national policy. In particular, he encouraged the Navy to convert from coal to oil. Although

the use of oil as a fuel for our warships had been under consideration since 1866, it was not until his administration, and with his encouragement and support, that the final decision to change was made—a change almost as significant as the one from sail to coal.

Today our Navy is embarked on an even greater change—from oil to nuclear power. I don't believe this will take as long as it took to convert from sail to steam or from coal to oil. Unlike the earlier changes in which merchant shipping took the lead, the change to nuclear power began with a naval vessel.

[fol. 79] Furthermore, the generation of nuclear power in significant quantities took place, for the first time, in the atomic engine of the land based prototype of the NAUTILUS in Idaho.

Before I discuss the impact of nuclear power on the Navy, I would like to give you my idea of two of the basic principles of waging Naval warfare:

One—Keep the potential battlefield away from the community centers of the United States and her allies. This calls for an ability to mount a self-sufficient and sustained operation. It calls for the ability to strike well within the enemy's borders, and to counter the return blow well away from our own borders or those of our allies.

Two—Keep the position of the launching point undisclosed. This requires mobility, and a denial to the enemy of intelligence concerning our intentions.

Various types of naval vessels are used for accomplishing these concepts. Stated simply, a naval vessel is a mobile platform for firing shells, for launching planes and missiles, or for sending or receiving men, munitions, fuel, and intelligence. This platform can be on the surface or below the surface of the ocean. The missiles can be shells, or rockets, or they can be guided. They can be fired directly from a gun, from a launching device, or from an airplane which homes on the floating platform. The naval airplane

is thus an airborne device which extends the range of the parent platform.

In the days of sail, men-of-war had unlimited cruising radius, but they were bound to the surface of the ocean and were dependent on wind and weather. In other words, they could go *anywhere* but not at *any time*.

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[fol. 80] In our work, as in every venture, trained people [fol. 81] are essential. In the early days, and over the protests of my leading people who did not want to interrupt their work, I sent many of them and also our new young people away for advanced technical training in nuclear engineering. At the time it seemed the wrong thing to do because of the extremely heavy work lead. But we knew that we had to develop many technically qualified people if we were to become an effective organization. Similar educational steps had to be taken by our contractors. Those of us who remained behind had to carry the burdens of the ones who went away to learn, but we became the stronger for it. The benefits from this technical training convinced me that it should be continued. As a result, nearly everyone who has joined us since the beginning, in 1948, has been sent away for additional training.

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[fol. 82]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT 6A

— FOR RELEASE AT 6:45 P.M. EST
THURSDAY, JANUARY 12, 1956

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U. S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
For Delivery at Dinner Sponsored by the
Society of Business Magazine Editors
Mayflower Hotel
Washington, D. C.

January 12, 1956

LEAD TIME AND MILITARY STRENGTH

I thank you for giving me this opportunity to speak to you. Perhaps you expect me to address you on the subject with which I am most familiar—development of atomic power to propel naval vessels. However, I asked your Chairman to permit me to speak on a broader subject, and one which I consider more important that atomic power—the effect of lead time on military strength.

It is my contention that lead time—the time which elapses between conception of a new idea, its development, and finally its fruition in the completed new article rolling from the production lines—is the factor which more than any other is likely to win the next war for the nation which succeeds in reducing it significantly below that of its competitor.

I have chosen this subject because I feel that, for the good of all of us, some things we presently assume must be reexamined—even if they are unpleasant. None of us can

afford, for our own or for the national interest, to wrap ourselves too tightly around our present assumptions and habits.

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[fol. 83] Our scientific discoveries will no longer be of particular advantage to us if the enemy develops them faster than we do. We have known for several years that our scientific training has been deteriorating and have done little about it.

The first step we must take is to improve the technical and scientific training of our young people. We are faced with a national problem of the first order and nothing less than an over-riding effort by all of us will meet it. There is no lack of knowledge of what must be done. Profound studies have been made on the subject and much has been said about it. But so far little has been *done*.

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[fol. 84]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT 6B-8

NEWS RELEASE — DEPARTMENT OF DEFENSE

PLEASE NOTE DATE — OFFICE OF PUBLIC INFORMATION

Washington 25, D. C.

(Emblem—Department of Defense)

HOLD FOR RELEASE — No. 170-57

UNTIL DELIVERY OF ADDRESS
EXPECTED ABOUT 12:00 NOON (EST)
FRIDAY, MARCH 1, 1957 — LI 5-6700 Ext. 76161

ADDRESS BY

REAR ADMIRAL H. G. RICKOVER, USN, CHIEF, NAVAL REACTORS BRANCH, DIVISION OF REACTOR DEVELOPMENT, U. S. ATOMIC ENERGY

COMMISSION AND ASSISTANT CHIEF OF THE BUREAU OF SHIPS FOR NUCLEAR PROPULSION BEFORE THE NAVY GUIDED MISSILE PREVIEW LUNCHEON SHERATON-PARK HOTEL, WASHINGTON, D. C. FRIDAY, MARCH 1, 1957—12:00 NOON (EST)

THE CHALLENGE OF NUCLEAR POWER

Many factors have been suggested as the major source of difficulty in achieving nuclear power. Secrecy, the novel scientific concepts involved, legal and governmental restrictions—each of these has been cited as the major stumbling block.

But the one factor which today most severely limits our exploitation of nuclear power is neither legal nor governmental. It is not a lack of new ideas, nor even a lack of understanding of recently developed ones. These do have some effect. The main problem is with materials and equipment generally considered as conventional, but which must conform to the exacting standards required of all components of a nuclear power plant.

Just as the strength of a chain is no greater than that of its weakest link, so does the successful operation of a nuclear power plant depend on the reliability of all its parts—not alone the nuclear reactor, but also the heat exchangers, pumps, valves, etc. In fact, our experience [fol. 85] with the four operating plants of the Naval Reactors Program has shown that it is these components which have proved less reliable than the nuclear reactor itself. Also, the cost of these components has been high and their delivery time poor. They have thus been the cause of much of the high cost and long completion time of today's nuclear power plants. Here, I believe, is an aspect of nuclear power whose importance is little understood, and which presents a challenge to industry.

It is commonly believed that nuclear power development is primarily the province of the nuclear physicist. Nothing could be further from the truth. What actually faces us is the need to determine by calculation and by experiment

how best to remove heat from a reactor, and then to design and build all of the components that make up the reactor system in such a way that they will operate efficiently and reliably under the rigorous conditions inherent in nuclear power generation.

It has not been difficult to focus the necessary attention on the novel features of nuclear power, such as the nuclear reactor itself. Here new problems were expected; they were easily recognized, and are being reasonably well solved. But it has been very difficult to get sufficient effort directed toward the more conventional aspects of nuclear plants—the heat exchangers, the pumps, the valves, the instrumentation. Here normal engineering and manufacturing techniques have proved to be inadequate when applied to nuclear plants. To manufacture satisfactory nuclear plants requires that the whole plateau of engineering design, materials, inspection, and training be raised significantly above present levels. This is so because a failure which would be trivial in a non-nuclear application could have serious consequences where radioactivity is in- [fol. 86] volved. It is also more difficult to maintain and repair equipment which is radioactive and welded hermetically tight.

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[fol. 87]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT 6A

FOR RELEASE AT 12:00 NOON
FRIDAY, MARCH 1, 1957

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U.S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
For Delivery at Navy Guided Missile Preview Luncheon
Sponsored by The District of Columbia Council of the
Navy League of the United States
Sheraton-Park Hotel
Washington, D.C.

March 1, 1957

THE CHALLENGE OF NUCLEAR POWER

Many factors have been suggested as *the* major source of difficulty in achieving nuclear power. Secrecy, the novel scientific concepts involved, legal and governmental restrictions—each of these has been cited as the major stumbling block.

But the one factor which today most severely limits our exploitation of nuclear power is neither legal nor governmental. It is not a lack of new ideas, nor even a lack of understanding of recently developed ones. These do have some effect. The main problem is with materials and equipment generally considered as conventional, but which must conform to the exacting standards required of all components of a nuclear power plant.

Just as the strength of a chain is no greater than that of its weakest link, so does the successful operation of a nuclear power plant depend on the reliability of all its [fol. 88] parts—not alone the nuclear reactor, but also the

heat exchangers, pumps, valves, etc. In fact, our experience with the four operating plants of the Naval Reactors Program has shown that it is these components which have proved less reliable than the nuclear reactor itself. Also, the cost of these components has been high and their delivery time poor. They have thus been the cause of much of the high cost and long completion time of today's nuclear power plants. Here, I believe, is an aspect of nuclear power whose importance is little understood, and which presents a challenge to industry.

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[fol. 90]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT 6B-11

NEWS RELEASE — DEPARTMENT OF DEFENSE

PLEASE NOTE DATE — OFFICE OF PUBLIC INFORMATION

Washington 25, D. C.

(Emblem—Department of Defense)

HOLD FOR RELEASE — NO. 901-57
UNTIL DELIVERY OF ADDRESS
EXPECTED ABOUT 2:00 P.M. (EDT)
SATURDAY, SEPTEMBER 14, 1957

LI 5-6700 Ext. 76161

ADDRESS BY

REAR ADMIRAL H. G. RICKOVER, USN, CHIEF, NAVAL REACTORS BRANCH, DIVISION OF REACTOR DEVELOPMENT, U.S. ATOMIC ENERGY COMMISSION AND ASSISTANT CHIEF OF THE BUREAU OF SHIPS FOR NUCLEAR PROPULSION,

AT THE MEETING OF THE NAVAL AFFAIRS COMMITTEE, AMERICAN LEGION ATLANTIC CITY, NEW JERSEY

SATURDAY, SEPTEMBER 14, 1957—2:00 P.M. (EDT)

THE NAVAL REVOLUTION

I greatly appreciate this opportunity to appear before the Naval Affairs Committee of the American Legion.

Your organization, which has done so much to help keep our country militarily strong and alert, is now almost forty years old.

Forty years is a short time when measured by the perspective of the history of armaments. For instance, our first steam-propelled warship, the Demologus, was designed and

built by Robert Fulton in 1814, but it was not until the 1880's that the Navy completed conversion from sail to steam.

It has often been said that the steamship revolutionized naval warfare, and so it did. However, as conversion of the world's navies from sail to steam took three quarters of a century, the changes wrought were evolutionary rather than revolutionary, and therefore less drastic in their impact than might have been expected.

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[fol. 91]

PLAINTIFF'S AND DEFENDENT'S JOINT EXHIBIT 6B-12

Remarks Prepared by Rear Admiral H. G. Rickover, U. S. Navy
for Delivery on the Occasion of the Bestowal
of the
International Communication Award
"Christopher Columbus" for 1957
Genoa, Italy

October 12, 1957

Your Excellency, Mr. President; Your Eminence; Distinguished Ambassadors; Honorable Chairman; Distinguished Guests; Ladies and Gentlemen:

I am highly honored to have been chosen for this year's "Christopher Columbus" Award which I gratefully accept on behalf of the Government and the Congress of the United States.

To say that the news of this honor surprised me would be an understatement. I am fully conscious that in an engineering project such as that of developing nuclear ship propulsion, success is never due to the labors of a single man. There must, of course, be someone to direct; but success depends as much on the faithful work of everyone concerned in the project as on the man who heads it. I feel very strongly that the "Christopher Columbus" Award be-

longs jointly to all the men and women of my organization without whose steadfast devotion and hard work there would have been no NAUTILUS.

Yet even this group cannot truly claim credit f r the development of nuclear propulsion. Our work could not have been done without the theoretical groundwork laid by many men from many lands—an international honor roll of scientists trained in European and American universities. These men of diverse national origins laid the foundations of our present knowledge of nuclear fission; among them your own countryman of beloved memory—Enrico Fermi.

[fol. 92]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 6B-14

NEWS RELEASE — DEPARTMENT OF DEFENSE

PLEASE NOTE DATE — OFFICE OF PUBLIC INFORMATION

Washington 25, D. C.

(Emblem—Department of Defense)

HOLD FOR RELEASE — No. 1170-57
UNTIL DELIVERY OF ADDRESS
EXPECTED ABOUT 12:00 NOON (EST)
THURSDAY, DECEMBER 5, 1957

LI 5-6700 Ext. 76161

ADDRESS BY

REAR ADMIRAL H.G. RICKOVER, USN,
CHIEF, NAVAL REACTORS BRANCH, DIVISION OF REACTOR DEVELOPMENT, U.S. ATOMIC ENERGY COMMISSION, AND ASSISTANT CHIEF OF THE BUREAU OF SHIPS FOR NUCLEAR PROPULSION

BEFORE THE MEETING OF THE OVERSEAS PRESS CLUB

NEW YORK, NEW YORK

THURSDAY DECEMBER 5, 1957—12:00 NOON (EST)

Revolution at Sea

I greatly appreciate this opportunity to appear before the Overseas Press Club.

We know that we are living in a period of great changes. At times we forget how fast changes have come about that we now take for granted. To understand what is happening and will happen in the future it is useful to reflect on the current rate of change.

For instance, our first steam-propelled warship, the Demologus, was designed and built by Robert Fulton in 1814, but it was not until the 1880s that the Navy completed conversion from sail to steam.

It has often been said that the steamship revolutionized naval warfare, and so it did. However, as conversion of the world's navies from sail to steam took three-quarters of a century, the changes wrought were evolutionary rather than revolutionary, and therefore less drastic in their impact than might have been expected.

Today our Navy is in the midst of another change—conversion from oil to nuclear power. This change is taking place so rapidly that it is, in truth, a revolution.

Let me give you a brief timetable. The idea of an atomic submarine was conceived in 1949. Four-and-one-half years later the land-based prototype of the propulsion plant for this submarine was operating, and a few months later the NAUTILUS was at sea.

[fol. 93] The SEAWOLF, our second nuclear submarine, was launched in 1955; the third one, the SKATE, is presently conducting her sea trials. The SWORDFISH and the SARGO, our fourth and fifth nuclear submarines, were launched this year. And 14 additional nuclear submarines are now under construction or authorized. Further, we are designing or constructing nuclear power plants for a guided missile cruiser, an aircraft carrier, and a frigate.

By the mid-1960s we should have in being the first nuclear powered task force—complete from submarines to carriers. Thus, a technological and military revolution, which in the past would have taken the better part of a century, will be completed in a decade.

We can predict with reasonable accuracy what effect conversion to nuclear propulsion will have on future naval warfare if we keep in mind that a naval ship, whether it be propelled by wind, coal, oil, or the atom, is simply a mobile platform which may be used for any or all of the following purposes: it can transport men and supplies; it can receive and transmit intelligence; it can be a base for launching firepower against an enemy. This firepower can come from shells, torpedoes, rockets, missiles, or bombs. These can be shot from a gun, released from a launching device, or dropped from an airplane which is launched from the ship. In the last case, the naval airplane merely extends the range of the mobile platform.

The history of naval engineering is a record of our efforts to design and build better moving platforms. Our aim has been to develop ships which have these ideal capabilities:

First, the capacity to go at full speed anywhere at any time; that is, unlimited cruising radius.

Second, the power to carry war to the enemy, which means that our ships can stop the enemy from approaching our shores while striking successfully at targets within the enemy's territory.

Third, the ability to keep their exact location secret, either through great mobility or through use of the ocean to shield themselves against the enemy's intelligence.

An ideal, by definition, must remain unfulfilled. All we can do is to try constantly to approach it. The sailing ship had unlimited cruising radius, but it was bound to the surface of the ocean, and depended on wind and weather. It could go anywhere, but not at any time.

Coal freed the surface ships from dependence on the weather, but this freedom was bought at a price. Ships could no longer cruise indefinitely; they had become tied

to coaling stations. Conversion from coal to oil extended the cruising radius, but did not eliminate the fundamental dependence on refueling.

Meanwhile, progress had been made in another direction. Naval engineers had learned to build ships that could go below the ocean's surface. The battery-driven submarine was the first mobile platform to use the ocean as a shield against enemy detection.

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[fol. 94]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 6B-15

AEC

UNITED STATES
ATOMIC ENERGY COMMISSION
Washington 25, D. C.

Tel. ST 3-8000
Ext. 307

FOR RELEASE AT 10:30 A.M. (EST)
(Friday, December 6, 1957)

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U.S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
on the Occasion of the Dedication of
Nuclear Power Training School
United States Naval Submarine Base
New London, Connecticut

December 6, 1957

Education in the Nuclear Age

We are celebrating an event which seems at first glance fairly routine: a stone has been laid upon which in due time there will arise a new school building. The school itself has been functioning for two years. Now it is being given appropriate shelter, indicating that the period of trial and experimentation has come to an end and the need for a school of this kind has come to be accepted, albeit not with enthusiasm nor with ananimity.

The school will cost a lot of money; the students will be expected to put in hard intellectual work of a kind which may seem unusual for men whose life is essentially one of action, not of reflection. It may well be asked: why need we select this group of men from among many and send them to a special school not open to the rest of their colleagues? The answer is simple: we have no choice.

[fol. 95] We have no choice but to develop a new kind of navy man to run a new kind of naval ship. The school provides the kind of education needed by the officers and men of a nuclear navy.

Whether or not to have a nuclear navy is not really a matter of choice either. I need not stress the military advantages of nuclear power. But there is another reason. Within a generation or two we shall be short of oil. Without oil for propulsion, we must go backwards, first to coal, then to sail. These have been the energy sources for naval propulsion in the past. Or we can go forward with new and infinitely more complicated types of energy, such as nuclear power. For our liquid fuels resources will not last too long. So far we have been able to maintain a proven reserve on hand, about ten years supply. Not a wide enough margin you might say. But to maintain this margin the oil industry will have to drill 1,200,000 oil wells in the U.S. during the next ten years. It has been estimated that during that period it must spend about $115 billion in the U.S. and abroad to maintain and expand its facilities. This is a prodigious effort. But even this must in the end fail. For man works out his destiny within the limits of a finite world, which in the end checkmates human expansion in things material.

Only in the realm of the spirit is there still room for enormous expansion, limited only by our mental capacities and our will to develop them to the utmost. Here we have hardly begun to scratch the surface, and vast treasures remain to be brought forth.

The past weeks have been a period of rude awakening for us. Our eyes and ears have been assaulted by the most distressing sort of news about Russia's giant strides in technology, based on the extraordinary success she has had in transforming her educational system—all but in ruins twenty years ago—into the most efficient machine for producing highly competent scientists and engineers—many more than we can hope to train through our own educational system which we have so long regarded with pride and affection.

We are slowly thinking our way through a thicket of bitter disappointment and humiliating truth to the realization that a nineteenth century educational philosophy is as hopelessly outdated today as the horse and buggy. Nothing short of a complete reorganization of American education, preceded by a revolutionary reversal of educational aims, can equip us for winning the educational race with the Russians.

Let me digress a little to go into this matter, though it is seemingly remote from today's event. I should like to do this because I think it is a matter of vital importance [fol. 96] to the Navy, no less than to the country as a whole.

Ours is a democracy. We cannot move forward faster than the majority of the people will permit us to go. Today the people are aroused because they sense that something is fundamentally wrong with American education when a country—three fourths illiterate a generation ago—can in twenty years catch up with us in so important a field of knowledge as science and engineering. The mass of well-reasoned criticism which is currently filling the air and the news columns is, however, so large as to be almost indigestible.

Let me condense it to a few major points. For greater details, I can think of no better source of information than the Hearings on the "Shortage of Scientific and Engineer-

ing Manpower" held before the Subcommittee on Research and Development of the Joint Committee on Atomic Energy of the Congress of the United States. These Hearings were held in April and May 1956, under the Chairmanship of the Honorable Melvin Price of Illinois. There, deft interrogation and high integrity and honesty brought forth all the facts which are needed to understand the problem: as well as enough good suggestions for practical reforms to undo in a reasonable length of time all the damage done our children and our future by fifty years of educational stagnation. Similar help will come from the Preparedness Investigation presently being conducted by the Senate Armed Services Committee. No American can consider himself a conscientious citizen who does not take the time and trouble to read these documents and to think them through. I, myself, have found them most helpful in formulating my own views on American education.

In my work in nuclear energy, the defects of our school system forced themselves upon my attention as long as ten years ago. Since then I have had occasion to interview more than a th[illegible]and young college men and officers. The design and de[illegible]ment of nuclear power plants is a difficult scientific [illegible]ngineering project encompassing the most advanced [illegible]cepts in physics, mathematics, chemistry, metallur[illegible], electrical engineering, electronics, and mechanical engineering. Young men with sound fundamental scientific and engineering knowledge and proper motivation are needed to carry the project forward. Despite the numbers who apply, I have never found more than a very small percentage who had the necessary qualifications. I could not but come to the conclusion that something was radically wrong with the schools and colleges to whom the education of these young men had been entrusted.

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[fol. 97] Once the American public realizes the desperate consequences of our great shortage of trained man power in terms both of national well-being in a resources-poor future, and of our very existence as an independent and strong nation; once the connection is made in everyone's mind between education and lack of vitally needed scientists

and engineers—there will I hope be action to undo the educational harm of the past half century. But we in the Navy cannot wait for this to happen. For we dare not fail our responsibility always to have ships and men at their maximum technological potential, so that we may be able to protect the freedom and liberty of our country in any war, hot or cold.

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[fol. 98]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 6B-16

AEC

UNITED STATES
ATOMIC ENERGY COMMISSION
Washington 25, D. C.

Tel. HAzelwood 7-7831
Ext. 3446

FOR RELEASE AT 4:00 P.M. (EST)
SUNDAY, MARCH 23, 1958

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U.S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
For Delivery at the
Fiftieth Anniversary Celebration
St. Albans School
Washington, D. C.

March 23, 1958

EUROPEAN AND AMERICAN SECONDARY SCHOOLS

A COMPARISON

I am delighted to speak here on a subject which I find as absorbing as my work in atomic energy. Indeed, I find the two so intertwined that I would have had to be most unobservant not to have gotten myself involved with American education.

In my constant search for competent people to work in the nuclear power program I was inevitably driven to the conclusion that something is radically wrong with our educational system. I have given this much thought and I believe it is possible to pinpoint *where* educational inadequacy causes a bottleneck and *why* this is so.

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[fol. 99]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 6B-20

NEWS RELEASE — DEPARTMENT OF DEFENSE

PLEASE NOTE DATE — OFFICE OF PUBLIC INFORMATION

Washington 25, D. C.

(Emblem—Department of Defense)

HOLD FOR RELEASE — No. 939-58
UNTIL DELIVERY OF ADDRESS
EXPECTED ABOUT 1:15 P.M. (EDT)
MONDAY, SEPTEMBER 29, 1958 — LI 5-6700 Ext. 76161

ADDRESS BY

REAR ADMIRAL H.G. RICKOVER, USN, ASSISTANT CHIEF, BUREAU OF SHIPS, FOR NUCLEAR PROPULSION, AND CHIEF, NAVAL REACTORS, BRANCH, DIVISION OF REACTOR DEVELOPMENT, AEC

AT MEETING OF ALTOONA LIONS CLUB, ALTOONA, PENNSYLVANIA

MONDAY, SEPTEMBER 29, 1958—1:15 P.M. (EDT)

The Meaning of the Nautilus' Polar Voyage

The reaction of the world to the epic journey of the NAUTILUS across the Arctic Sea and under the North Pole far surpassed the imaginations of all of us who have been closely associated with the development of this fine ship. The name of the NAUTILUS and its intrepid skipper, Commander Anderson, will have a secure place on the roster of naval ships and heroes who have explored the Arctic. To reach the North Pole by sea has long been a goal of the U.S. Navy. As long ago as 1879 Lt. George W. De-Long, in command of the JEANETTE, left the Navy yard at Mare Island, California, on an expedition to the North Pole. The voyage was ill-fated and but few survivors returned after three long years of incredible hardship. Many expeditions followed; few succeeded. The statement that "The Arctic Ocean has been for years the nursery of heroic deeds" could well have been the motto of our Navy's long efforts to conquer the Arctic.

For those who are interested in adventure and exploration, the journey of the NAUTILUS and of her heroic crew will always remain one of the great naval achievements of our time. To the scientific-minded, the complex nuclear propulsion plant of the NAUTILUS and the many novel and ingenious navigational devices which guided her safely through unknown waters will prove endlessly exciting. All thoughtful persons will contemplate this Arctic journey with mixed feelings. Proud as we have a right to be that an American ship was the first to cross the Pole, we cannot escape a sense of sober concern if not of anxiety. With this voyage, another protective shield has disappeared to leave an already insecure and apprehensive world still more exposed to sudden attack.

Steaming at speeds in excess of 20 knots through the dark seas below the polar icecap, the NAUTILUS has in one bold step opened a new frontier. Science and engineering, by creating nuclear propulsion, have demolished the traditional fortress-like protection of the polar icecap which had heretofore shielded the lands bordering on the Arctic. No longer is the Arctic Ocean with its thick roof of ice inscrutable to man's curiosity. It will now be exploited

both for commercial interests and for military and naval purposes. Everyone who lives in lands bordering the Arctic seas knows that these areas have now become accessible not only from the air but from the sea as well. Obviously, the Arctic waters will be accessible only to those nations who possess nuclear-powered submarines. Any one of these nations may decide some day to turn these frozen seas into the next military theater. Modern technology has thus brought another once-distant part of the globe into the center of world politics.

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[fol. 100]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 7

THE TAMPA TRIBUNE
MORNING AND SUNDAY
V. M. NEWTON, JR.
MANAGING EDITOR

PUBLISHED BY THE TRIBUNE COMPANY
BOX 191
TAMPA 1, FLORIDA

April 24, 1959

Admiral Hyman G. Rickover
U. S. Navy Department
Washington, D. C.

Dear Admiral Rickover:

I am writing this letter as chairman of the national Freedom of Information Committee of Sigma Delta Chi, the professional journalistic fraternity which has 20,000 publishers, editors and newsmen as members.

It is with great concern that we view your action in copyrighting your public speeches and we fear also that this is a deliberate move on your part to limit future publication

of your thinking, and particularly so when you perhaps should undergo criticism from the taxpayers.

I realize that your copyright permit contemporaneous press use of your speeches, but it does not permit use of them or any part of them say a month after they were delivered.

This, of course, cuts off use of them in public criticism after say a month's reflection by the tax-paying citizen. It also restricts communication of your views to a narrow section of the free American press and limits their publication to hurried news accounts prepared against deadlines.

You, as an admiral in the U. S. Navy, are a public servant, answerable to the taxpaying citizens who employ you. And I have the strong belief that all of your actions and particularly all of your public statements, all made from your position as a prominent public servant, should have the widest possible communication among all American taxpayers.

Believe me, I will be grateful for word from you on this important matter and, as an admirer of yours, I sincerely hope that we can clear up this problem before I am put in a position of a public protest.

Sincerely yours,

V. M. Newton, Jr.

VMNJr/bs

cc to Messrs: James Byron
Victor Bluedorn
M. B. Schnapper

[fol. 101]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 8
DEPARTMENT OF THE NAVY
BUREAU OF SHIPS
WASHINGTON 25, D.C.

(Emblem—Department of Defense)

[Stamp—Received—Smith, Hennessey and McDonald—May 8—9 06 AM—1959.]

6 May 1959

Mr. V. M. Newton, Jr.
Managing Editor, The Tampa Tribune
The Tribune Company
Box 191
Tampa 1, Florida

Dear Mr. Newton:

Thank you for your letter of April 24, 1959.
To place any limitation on the publication of thinking, whether it be my thinking or that of anyone else, is the exact opposite of my desire.

I have been accepting a number of speaking engagements because they give me an opportunity to voice my deeply felt conviction that we must do everything we can to improve our education methods. In keeping with the general practice today each of my speeches is mimeographed and made available to the press prior to delivery. Many newspapers have given considerable space to the talks and I appreciate that additional circulation of my ideas.

It was with the desirability of newspaper coverage in mind that in copyrighting my speeches, since my book "Education and Freedom" published by E. P. Dutton & Co., Inc. went to press, I have been adding to the copyright notice on each speech the provision, "No permission needed for contemporaneous press use." It did not occur to me that there would be any newspaper interest in using the material after a few days had passed and if there should be I shall promptly authorize such use. However, in the light of your suggestion I am going to change the expression in

future cases by deleting the word "contemporaneous" and making it clear that newspapers and news periodicals are free to use the material without any limitation as to time.

As for critics, they have the right to quote at any length. I certainly have no desire to avoid criticism because I value too highly my own right to be critical.

In this letter I have not undertaken to discuss the legal question of whether or not a member of the Armed Services has the right to own and to protect by copyright material which he writes otherwise than as part of his official duties. Departmental regulations have for some time recognized such a right and there is legal precedent on the subject. However, the question has recently been reopened in the federal court in this district in an action [fol. 102] for a declaratory judgment brought against me by Public Affairs Press and while this limits my reply to your letter it is an indication that we may soon have some additional light on the subject.

Sincerely yours,

H. G. Rickover
Vice Admiral, USN

Blind copy to:

Mr. Joseph McDonald
Mr. A. H. Helvestine

[fol. 103]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 9

FOR RELEASE AT 8:00 P.M. (EST)
THURSDAY, DECEMBER 11, 1958

Remarks prepared by VADM H. G. Rickover, USN
Assistant Director for Naval Reactors
Division of Reactor Development
U.S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
for delivery at
The Harvard Club of New York City
New York, New York

December 11, 1958

EDUCATION—OUR FIRST LINE OF DEFENSE

Since you invited me to discuss my views on American education, I take it for granted that you share my anxiety over its present state and that you believe with me that what goes on in the nation's classrooms is a matter of legitimate concern to every American which he has a right to discuss in public. Robert M. Hutchins warns that "an uncriticized culture will not endure," and Aristotle, writing in the twilight of Athenian democracy, reminds us that education is every nation's most important business. The education of youth, says this most famous of Plato's pupils, is not merely one among the many concerns to which the lawmaker must "direct his attention," but the *primary* one, "for the neglect of education ruins the constitution of the state."

Hutchins and Aristotle are separated in time by more than two thousand years but their thinking is close because they are both firmly rooted in Western civilization. Their two statements sum up the theme of my speech.

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[fol. 104] Though I have never taken a course in "education," I have been running schools for years. Everyone in my atomic power group has taken a hand at some time or other at teaching what he has first had to teach himself about the new science of nuclear engineering. We have set up schools for our own engineers and for industry people, as well as for the officers and men who will operate our nuclear ships. In our post-graduate program we teach the exacting requirements of reactor design, construction, and management. We, too, have come across [fol. 105] deplorable lacunae in the education of our students; like so many colleges, we have had to give them "remedial" courses! My concern with education predates the Sputniks by several years and sprang from my dissatisfaction with the products of our schools. My work keeps me pretty busy and I am not looking for more things to do. Only a strong motive could have induced me to give up the little leisure I have in order to familiarize myself with our educational problem. I speak on education only because I am anxious about the future of our country, should present educational practices continue.

As any engineer would, I noticed many years ago that Russia, with her tremendous new educational program and her single-minded determination to outpace us in science and technology, was gaining momentum at a time when we were losing momentum. This shows up in the constant lengthening of lead time in this country—from 2½ years during World War II to about ten years today—while in Russia lead time for military hardware has been cut drastically and is now about half ours. Lead time as you know is the time which elapses from inception of a new idea to its utilization in the finished product coming off the production lines. As an engineer, engaged in pushing through a new engineering project, it has long been

obvious to me that we cannot shorten lead times as much and and rapidly as we must to keep ahead of Russia, unless we find ways to remove the many roadblocks, both technical and non-technical, which delay *all* our attempts at technological breakthroughs. My own work in nuclear propulsion is merely *one* such instance. The same roadblocks hinder every one of our new development projects, [fol. 106] be they in jet engines, rockets, missiles, satellites, or attempts to obtain energy from hydrogen fusion.

Nearly all these roadblocks are caused by people whose education has not prepared them for the extremely difficult problems which arise when we seek to progress beyond present levels of technology.

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[fol. 107] It is no exaggeration to say that a major part of our time has been taken up with fighting for higher levels of performance which are resisted because their necessity is not understood. We have had great difficulty convincing outsiders that more rigorous standards are es- [fol. 108] sential if nuclear power is to be harnessed safely and efficiently. Resistance arises from what one might call an intellectual toryism—an inflexibility which has its roots in an educational system that does not prepare young people for life in our constantly changing world; a world subject to recurrent bouleversements which rapidly make old attitudes and procedures obsolescent and demand that we have flexible and versatile minds. If and when we obtain energy from hydrogen fusion, still greater demands will be made on the scientific, engineering, and administrative abilities of everyone involved with this new source of power.

[fol. 109] I began work on nuclear propulsion by setting out to find men of independent mind and venturesome spirit to make up my reactor group. From the start it was evident that no experienced men of this type were available. Before we could seriously tackle our work, we therefore had to find young people showing *potentialities* of growth whom we could then ourselves train intensively for work on reactor design. I have interviewed more than two thousand young men in the last twelve years,

all top men in their college class. My naval reactor engineering group presently numbers about 150. Since the men who came to see me had already passed through a number of previous interviews where all but the best were eliminated, it is evident that those who could *not* meet the requirements of the nuclear power project—and hence inferentially of *any* new development project—vastly outnumbered those who qualified.

This experience made a deep impression on me. It led me directly to a study of why our educational system [fol. 110] produces so few men who are qualified to do the work which we must do if we are to progress. I found that our schools are the greatest "cultural lag" we have today.

• • • • • • •

[fol. 111]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 12

FOR RELEASE AT 10:30 A.M. (PST)
THURSDAY, MAY 28, 1959

Remarks prepared by VADM H. G. Rickover, USN
for delivery at
The American Public Power Association Convention
Seattle, Washington

May 28, 1959

THE SHIPPINGPORT ATOMIC POWER STATION

LESSONS FROM ITS OPERATION

The purpose of the Shippingport project is stated in the contract between the U. S. Atomic Energy Commission and the Duquesne Light Company as follows:

> "It is anticipated by the parties that the information to be gained by the construction and operation of the Pressurized Water Reactor will probably permit a major advance toward realization of civilian nuclear

power and that such information is expected to lead to further technical advances in subsequent power reactors. It is recognized that this first full-scale nuclear power plant will be of a developmental nature and will be operated with the primary objective of gaining information and advancing reactor technology rather than with an objective of furnishing dependable power and maintaining a high load factor."

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[fol. 112]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 13

(Emblem—Department of Defense)

August 17, 1957

NUMBER 5230.9

ASD(PA)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Clearance of Department of Defense Public Information

Refs.: (a) DoD Directive 5230.9, "Clearance of DoD Public Information", March 29, 1955 (cancelled herein)

(b) DoD Directive 5200.1, "Safeguarding Official Information in the Interests of the Defense of the United States"

(c) DoD Directive 5200.6, "Policy Governing the Custody, Use and Preservation of DoD Official Information Which Requires Protection in the Public Interests"

I. PURPOSE

This directive prescribes guidelines for the clearance of official speeches, press releases, photographic material and other information originated within the Department of Defense or any of its agencies for public release. It also prescribes a uniform policy and procedure for the review of manuscripts concerning military matters prepared by military personnel and civilian employees, as individuals for publication.

II. CANCELLATION

Reference (a) is hereby cancelled.

III. GENERAL PRINCIPLES GUIDING THE RELEASE OF INFORMATION

The people of the United States are properly interested in the Department of Defense and the steps it is taking to protect the national security. The Department of Defense has an obligation to inform the public with respect to the Department's activities and to provide the public with accurate, factual and other proper information regarding the Army, Navy, Air Force and Marine Corps. Public access shall be limited only by restrictions imposed in the national interest pursuant to law in order to safeguard information requiring protection in the interest of national defense (see Reference (b) or the Atomic Energy Act, as amended) and certain other information, the publication of which, would be against the public interest. (see Reference (c)).

[fol. 113] Information provided should be timely and presented to the public through the usual news media (press, magazines, journals, radio, television, etc.) in a manner consistent with the ethics and procedures normally followed in dealing with such media.

IV. Security and Policy Review

A. Defense information originated by the Department of Defense or any of its agencies for official release to the public through news media by military or civilian personnel of the Department of Defense, such as official speeches, press releases, and photographic material, shall be submitted to the Secretary of Defense through the Assistant Secretary of Defense (Public Affairs) or other designees for review and clearance; speeches not less than five days before delivery date, other material as early as practicable.

B. Military and civilian personnel shall not make any commitment to furnish official manuscripts to any outside publication unless prior clearance is obtained from the appropriate Secretary of a military department, and the Secretary of Defense or their designees. All such official manuscripts on military matters written by military and civilian personnel for outside publication shall be submitted for review and clearance by the appropriate Secretary of a military department and the Secretary of Defense or their designees before submission to the publisher or editor.

C. Material originating within the Department of Defense shall not be cleared for public release until it is reviewed for violations of security and for conflict with established policies or programs of the Department of Defense, or those of the national Government, since such material may have national or international significance. Nothing in this directive shall be deemed to authorize the refusal to clear material, otherwise releasable, because its release might tend to reveal administrative error or inefficiency.

V. WRITING FOR PUBLICATION BY DEFENSE PERSONNEL, AS INDIVIDUALS

Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security.

[fol. 114] VI. IMPLEMENTATION

It is requested that the Secretaries of the military departments issue such supplementary guidelines implementing this directive as they consider necessary or appropriate to accomplish the purposes hereof. It is recognized that certain types of information—for example, information released by local commands not having overriding national defense policy implications—cannot be cleared in full compliance with the requirements of this directive. To provide adequate leeway in such cases it is appropriate for the Secretary of any military department to submit to the Secretary of Defense for approval, through the Assistant Secretary of Defense (Public Affairs) supplemental general instructions governing the clearance of such matters.

VII. Responsibility

All personnel of the Department of Defense shall assume personal responsibility for compliance with the provisions of this directive.

VIII. Effective Date

This directive is effective immediately.

/s/ C. E. Wilson
Secretary of Defense

[fol. 115]

Plaintiff's and Defendant's Joint Exhibit No. 14

Navy General Regulations

1252. Disclosure and Publication of Information.

1. No person in the Naval Establishment shall convey or disclose by oral or written communication, publication, or other means, except as may be required by his official duties, any information whatever concerning the Naval or other Military Establishment or forces, or any person, thing, plan, or measure pertaining thereto, when such information might be of possible assistance to a foreign power; or, except by proper naval authority, any information contained in the official records of the Government or otherwise acquired which, for reasons of public policy, should not be disclosed to persons not of the Naval or other Military Establishments; nor shall any person in the naval service make any public speech or permit publication of any article written by or for him which is prejudicial to the interests of the United States.

2. No person in the Naval Establishment shall, other than in the discharge of his official duties, disclose any information whatever, whether classified or not classified, or whether obtained from official records or within the knowledge of the relator, which might aid or be of assistance in the prosecution or support of any claim against

the United States. (See act of June 25, 1948, ch. 645, sec. 1 § 283, 62 Stat. 697, as amended; 18 U. S. C. 283.)

3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department.

4. No person in the naval service shall act in time of war as correspondent of a news service or other periodical, or as a radio news commentator or analyst, unless assigned to duty in connection with the public relations activities of the Naval Establishment, or specifically authorized by the Secretary of the Navy. In time of peace, a person in the naval service may act in such capacity, but the Secretary of the Navy shall be immediately informed. Except as authorized by the Secretary of the Navy, no person assigned to duty in connection with the public relations activities of the Naval Establishment shall receive any compensation for acting as such correspondent, commentator, or analyst.

5. Subject to the requirements and restrictions of this article, persons in the naval service are at liberty to publish articles without further permission from higher authority.

[fol. 116]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT NO. 15

Schedule A

Speeches Made by H. G. Rickover During the Period Commencing October 20, 1955 and Ending January 16, 1959

1. METALLURGY IN ATOMIC POWER
October 20, 1955
National Metals Congress of the American Society for Metals
Philadelphia, Pa.

2. NUCLEAR POWER AND THE NAVY
October 27, 1955
San Francisco Council of the Navy League, the Chamber of Commerce and the Commercial Club
San Francisco, Cal.

3. ENGINEERING AND SCIENTIFIC EDUCATION
November 22, 1955
The Thomas Alva Edison Foundation, Inc.
East Orange, N.J.

4. LEAD TIME AND MILITARY STRENGTH
January 12, 1956
The Society of Business Magazine Editors
Washington, D. C.

5. NUCLEAR POWER AND THE NAVY
August 16, 1956
Bellefonte Sesquicentennial
Bellefonte, Pa.

6. THE EDUCATION OF OUR TALENTED CHILDREN
November 20, 1956
The Institute Sponsored by the Thomas Alva Edison Foundation, Inc.
East Orange, N.J.

7. NUCLEAR POWER—CHALLENGE TO INDUSTRY
January, 1957
Draft prepared but not delivered as a speech.

8. The Challenge of Nuclear Power
March 1, 1957
The District of Columbia Council of the Navy League of the United States
Washington, D. C.

9. The Talented Mind—An Opportunity and an Obligation
March 11, 1957
Westinghouse Science Talent Search Award Ceremony
Washington, D. C.

10. Energy Resources and Our Future
May 14, 1957
Annual Scientific Assembly of the Minnesota State Medical Association
St. Paul, Minn.

11. The Naval Revolution
September 14, 1957
American Legion Naval Affairs Committee
Atlantic City, N.J.

[fol. 117] 12. International Communication Award "Christopher Columbus"
October 12, 1957
Genoa, Italy

13. The Balance Sheet on Education
November 22, 1957
The Institute Sponsored by the Thomas Alva Edison Foundation, Inc. at the Engineering Society of Detroit
Detroit, Mich.

14. Revolution at Sea
December 5, 1957
Overseas Press Club
New York, N.Y.

15. Education in the Nuclear Age
December 6, 1957
Dedication of Nuclear Power Training School
New London, Conn.

16. European and American Secondary Schools—A Comparison
March 23, 1958
Fiftieth Anniversary, St. Alban's School
Washington, D.C.

17. The Truth Shall Make You Free
April 19, 1958
The Inauguration Ceremonies of Polytechnic Institute of Brooklyn
Brooklyn, N.Y.

18. The Meaning of Your Profession
June 14, 1958
Stevens Institute of Technology
Hoboken, N.J.

19. Investment in Human Resources
September 25, 1958
Engineers Club of St. Louis
St. Louis, Mo.

20. The Meaning of the Nautilus' Polar Voyage
September 29, 1958
Altoona Lions Club
Altoona, Pa.

21. A Common Heritage
October 23, 1958
Columbia University Forum
New York, N.Y.

22. Theodore Roosevelt—Modern American
October 27, 1958
Presentation, Theodore Roosevelt Distinguished Service Medal
New York, N.Y.

23. Education—Our First Line of Defense
December 11, 1958
The Harvard Club of New York City
New York, N. Y.

[fol. 118]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 16

Schedule D

AGREEMENT, made this 9th day of July 1958, between HYMAN G. RICKOVER of Bureau of Ships, United States Department of Navy, Washington, D. C., herein termed the Proprietor and referred to as "He", of the first part and E. P. DUTTON & Co., INC., a corporation of the State of New York, herein termed the Publishers, of the second part.

WHEREAS, the Proprietor is Proprietor of a work at present known as ADDRESSES OF ADMIRAL RICKOVER which work the Publishers agree to publish on the terms and conditions specified hereinafter:

• • • • • • •

[fol. 119] OTHER RIGHTS. 8. (a) The Publishers shall have the exclusive right, in the territories covered by this agreement, to arrange, execute contracts in its own name and receive payments, for the sale of the following rights, and if any such rights are sold, the net proceeds shall be divided equally between the Proprietor and the Publishers:

ANTHOLOGY OR QUOTATION
BOOK CLUB
DIGEST, ABRIDGMENT OR CONDENSATION
ONE-SHOT POST-PUBLICATION REPRINT EDITION THROUGH ANOTHER PUBLISHER
SECOND SERIAL AND SYNDICATION

• • • • • • •

[fol. 120] PAYMENTS. 16. It is understood and agreed that all earnings payable under this agreement shall be paid to The Crippled Children's Society of the District of Columbia, 2301 Pennsylvania Avenue, N.W., Washington, D.C.

PAYMENTS. 17. It is understood and agreed that there shall be no royalties paid on direct sales to the Thomas Alva Edison Foundation, Inc.

• • • • • • •

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PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 21

Schedule H

The following senior military officers published books while on active duty:

1. Gen. Omar Bradley, U.S. Army, "A Soldiers Story" (Henry Holt, June 15, 1951). General Bradley was Chairman, JCS at time of publication.

2. Gen. Laurence Kuter, USAF, "Airman at Yalta" (Duell, Sloan & Pearce, 1955). General Kuter was commander, Air University at time of publication.

3. Maj. Gen. William A. Dean, U.S. Army; "The Great Soldier" (Viking Press, 1945). General Dean retired on October 31, 1955.

4. Gen. George Kenney, USAF, "General Kenney Reports" (Duell, Sloan & Pearce, 1949). General Kenney was commander, Air University at time of publication. His previous assignment was commander, SAC.

5. Adm. Hyman G. Rickover, U.S. Navy, "Education and Freedom" (Dutton, 1958). Vice Admiral Rickover is on active duty with the Navy and is connected with atomic submarine research and development.

6. Rear Adm. George J. Dufek, U.S. Navy, "Operation Deep Freeze" (Harcourt Brace, 1958); "Through the Frozen Frontier" (Harcourt Brace, 1959). Admiral Dufek is commander of Operation Deep Freeze I, II, III, IV.

7. Maj. Gen. John Russell Deane, U.S. Army, "Strange Alliance" (Viking Press, 1947). General Deane had just returned from an assignment in Russia.

8. Maj. Gen. James Gavin, U.S. Army, "Airborne Warfare" (Infantry Journal Press, 1947). General Gavin was commander, 82d Airborne Division, Fort Bragg, N.C., at time of publication.

9. Lt. Gen. Henry "Hap" Arnold, USAAF, and Brig. Gen. Ira Eaker, "USAAF Army Flyer" (Harper & Bros., 1942). General Arnold was Chief of the Air Corps and Chief of Staff for Air in the War Department at time of publication.

10. Maj. Gen. Henry "Hap" Arnold, U.S. Air Corps, and Lt. Col. Ira Eaker, "USAC This Flying Game" (Funk and Wagnalls, 1938). General Arnold was Chief of the Air Corps.

11. Adm. Alfred T. Mahan, U.S. Navy, "The Influence of Sea Power Upon History, 1660-1783" (Little, Brown, 1890). Admiral Mahan was a professor at Annapolis.

[fol. 122] 12. Rear Adm. Dan Gallery, U.S. Navy, "Clear the Decks" (Morrow, 1951); "Twenty Million Tons Under the Sea" (Regnery, 1956). Admiral Gallery published these while on active duty. He is still on active duty. Admiral Gallery has also published numerous highly controversial articles in major magazines such as Saturday Evening Post and the late Collier's. Several were strong indictments of the Air Force, especially the B-36 and long-range bombers.

13. Gen. Mark Clark, U.S. Army, "Calculated Risk" (Harper & Bros., 1950). This was a highly controversial book when it came out. General Clark was commander, 8th Army in Korea at time of publication.

14. Gen. Dwight D. Eisenhower, U.S. Army, "Crusade in Europe" (Doubleday, 1948). General Eisenhower, at the time of publication, was officially on active duty drawing full pay and allowances. He retired from the service on May 31, 1952 and resigned his commission in July 1952. The book was written while he was Chief of Staff of the U.S. Army, November 19, 1945, to February 7, 1948.

15. Gen. Douglas MacArthur, U.S. Army, "MacArthur on War" (Duell, Sloan & Pearce, 1942). This is a collection of General MacArthur's writings and papers as Chief of Staff, U.S. Army, and reflects his

thoughts on war and U.S. military situation. At time of publication General MacArthur was commanding general, U.S. Army Forces in the Far East.

[fol. 123]

PLAINTIFF'S AND DEFENDANT'S JOINT EXHIBIT No. 24

December 20, 1958

Dear Mr. Schnapper:

Your letters of 9 and 10 December 1958, concerning the matter of placing copyright notice on lectures on education by Admiral Rickover have been received.

Admiral Rickover has obtained his copyright as a private citizen, not in connection with his official capacity. Therefore, I do not deem it proper for the Department of the Navy to render a legal opinion as to its validity.

Should you wish to challenge the validity of Admiral Rickover's copyright, you are, of course, certainly free to do so insofar as the Department of the Navy is concerned.

Sincerely yours,

/s/ Thomas S. Gates, Jr.

SECRETARY OF THE NAVY

Mr. M. B. Schnapper
Executive Director
Public Affairs Press
419 New Jersey Avenue, S.W.
Washington 3, D. C.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~64~~ 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

STANLEY B. FROSH
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Washington 6, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

Public Affairs Associates, Inc., trading as Public Affairs Press, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, in case No. 15,463, is set forth hereinafter as Appendix A. The judgment of the court below is set forth as Appendix B.

The opinion of the United States District Court for the District of Columbia is reported at 177 F. Supp. 601, and is set forth in the Brief for Appellant and Appendix Below, at p. 54. (This Appendix served as the Joint Appendix below.)

JURISDICTION

The judgment of the Court of Appeals was entered in the above-entitled action on October 20, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Where speeches by a high-ranking and policy-making Federal official, which deal with subjects connected with and growing out of his official responsibilities, were prepared on Government time and with Government personnel and facilities, were publicly delivered while he was on official duty, and were widely distributed as official press releases on Government letterhead without disclaimer of official character, may such public official:

1. copyright such speeches as private property, or are they "Government publications" under the Printing Law or "publications of the United States Government" under the Copyright Law?

2. arbitrarily bar or limit access of the press to such speeches under the First Amendment to the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Copyright Law, 17 U.S.C. 8, provides: "No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof . . ." This provision of law dates from 1909, 35 Stat. 1075, § 7.

2. The Printing Law, 44 U.S.C. 58, provides in part that " . . . No publication reprinted from such stereotype or electrotype plates ["from which any Government publication is printed"] and no other Government publication shall be copyrighted." This provision of law dates from 1895, 28 Stat. 608, § 52.

3. The First Amendment to the Constitution, so far as pertinent, provides that "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The facts are as follows:

1. Petitioner is an educational publisher, located in Washington, D. C.; it specializes in pamphlets and books on national affairs.

2. Respondent is a Vice Admiral, one of 26 top officials in the entire United States Navy. During the pertinent period he was on active duty in the Navy Department as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and also as Assistant Director for Naval Reactors, Division of Reactor Development, United States Atomic Energy Commission. He is generally credited with a major role in achievement of America's first atomic submarine as well as the nation's first commercial atomic power plant at Shippingport, Pennsylvania.

3. Between October 20, 1955 and October 27, 1958, Admiral Rickover delivered 22 speeches on matters directly related to or growing out of his official duties.

4. The texts of all these 22 speeches were official publications. As shown in Plaintiff's Exhibit Below 6B thirteen were officially issued by the U.S. Atomic Energy Commission and nine by the U.S. Department of Defense as official and sanctioned Government press releases on Government letterhead, with official notice thereon that Government information officers were available to discuss and provide further information on the speech or its contents. Copies were also officially furnished to the press and made available to the public at large. At the time of delivery and distribution no restriction whatsoever was placed upon their publication, in whole or in part, nor was there any indication whatsoever that they were not official statements.

For this Court's convenience, photocopies of the title pages of two such speeches are reproduced in Appendix C.

5. The General Regulations of the U. S. Navy, Article 1252, Par. 3, require that all non-official publications by all persons in the Naval Service shall bear "a statement to the effect that the opinions or assertions contained therein are the private one

of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large." (Exhibit Below, No. 14. See Brief for Appellant and [Joint] Appendix, p. 28 and opinion below).

6. Respondent admits that he did not make such disclaimer in any of the 22 speeches. (Respondent's Brief Below, p. 2) The Trial Court found that "some of them dealt with ideas that the Admiral developed in connection with his activities as a Naval officer", 177 F. Supp. 601. 602.

7. Respondent made no application for copyright registration on any of these 22 speeches until December 1, 1958, *after* all of them had been delivered and official press releases had been officially distributed. When furnished to the Copyright office the speeches were identical with the original releases in all respects but one: they did not reveal their original government imprimaturs as shown in Exhibit C.

8. On or about October 29, 1958, the Petitioner requested Respondent for copies of certain of these speeches in order to quote from them. Therefore, but prior to December 1, 1958, Respondent adjured the Petitioner not to quote from such speeches.

9. Respondent delivered four speeches after December 1, 1958. Contrary to earlier practice, these were submitted to the Copyright Office for registration prior to their delivery.

10. A list of the 26 speeches, their delivery dates, and the United States Government agencies which published them as press releases appears in Appendix D. Among these 22 speeches were the following titles:

"Metallurgy in Atomic Power"
"Nuclear Power and the Navy" (twice)
"Lead Time and Military Strength"
"Nuclear Power—Challenge to Industry"
"The Challenge of Nuclear Power"
"The Naval Revolution"
"The Meaning of the Nautilus' Power Voyage"

Subsequent speeches included "The Shippingport Atomic Power Station: Lessons from its Operation."

11. At all times when he delivered the speeches the Respondent was on official duty and had not taken leave for personal purposes. His travel to the location of the speech was paid for by the United States Government.

12. No question is involved of secrecy or control of information for reasons of national security or because of executive privilege.

REASONS FOR GRANTING THE WRIT

This is an important case. It involves issues of national concern, unresolved construction of Federal statutes of wide application, substantial conflicts among the various Courts of Appeals, refusal of the Court of Appeals below to follow applicable determinations of law by this Court, and unsettled Constitutional issues of Freedom of the Press.

This is a case "of *general* importance", in the terms of Mr. Justice Harlan.[1] It involves what Chief Justice Hughes called "controversy of importance with respect to legal principles".[2] Its result will, in the words of Chief Justice Vinson, "have immediate importance far beyond the particular facts and parties involved" and affect "tremendously important principles upon which are based the plans, hopes, and aspirations of a great many people throughout the country."[3]

I. Conflict between Courts of Appeals (Rule 19, 1(b), first clause).

The Courts of Appeals for the Second and Eighth Circuits have rendered decisions involving private ownership or copyright of documents alleged to have been prepared by a Federal

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[1] *Manning the Dikes—Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 THE RECORD OF THE N.Y.C.B.A. 541, 557 (1958).

[2] Address to American Law Institute, May 10, 1934, 20 A.B.A.J. (1934).

[3] Address to the American Bar Association, *Work of the Federal Courts*, Sept. 7, 1949, 69 S. Ct. V, at VI.

employee in the course of official duty. In each such case these Courts of Appeals adopted a rule of law in conflict with the rule of law adopted below here. Such rulings of the Second and Eighth Circuits, if applied here, would yield an opposite result on the determinative legal issue of whether Respondent's speeches were made in the course of official duty.

Sawyer v. Crowell Publishing Company,[4] from the Second Circuit, held that a map produced by a Federal employee could not be copyrighted by him in his private capacity because it was produced in the course of his official duties. The inconsistency between *Sawyer* and the decision below is very aptly described in a perceptive and scholarly discussion of the very case now before this Court by Mr. Donald L. Gunnels.[5] The "basic question raised was the same", he says, in both cases. The courts differ in "the degree or amount of connection required between the material and an employee's paid job functions to warrant a denial of copyright protection":

"The courts in *Rickover* and *Sherrill* believed an employee to be entitled to copyright protection in any material not produced by him as *the specific thing* which his duties required him to produce. The court in the *Sawyer* case felt that an employee has no claim to protection in any material he produces which has a direct relationship in subject matter to his paid job activities. It should also be noted that the *Sawyer* case also attached weight to the fact that Government time and facilities were utilized in producing the material whereas the *Rickover* case considered these factors to be of no material consequence whatever."[6]

Likewise in conflict with the decision below is *United States v. First Trust Co. of St. Paul*, from the Eighth Circuit, which

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[4] 46 F. Supp. 471 (D.C.S.D.N.Y. 1942), *aff'd* 142 F. 2d 497 (2d Cir. 1944), *cert. denied* 323 U.S. 735 (1944).

[5] *Copyright Protection for Writers Employed by the Federal Government*, 1960 WASH. U. L. Q. 182. (The note dealt with the District Court's decision; on this issue , the Court of Appeals confirmed the District Court's ruling.)

[6] *Id.* at 180. The views of the court below on the use of Government facilities are stated in footnote 20 of its opinion.

involved the original rough notes for the formal diary of the Lewis and Clark Expedition. There the United States claimed that such notes had been made in the course of official duty; the court held otherwise on the following basis: "These notes had no relation to the affairs of the [Indian] Agency. They were not made in connection with Clark's conduct of the Agency" [and therefore were not made in the course of his official duties][7]

The chasm between the court below and the conflicting decisions of the Second and Eighth Circuits can be seen from the very fact that the court below did not even believe it necessary to attempt to distinguish between the speeches pertaining to the Respondent's official duties and those which possibly did not.[8]

Thus, two other Courts of Appeals use different legal approaches "on the same matter," approaches that are in direct conflict and would cause opposite results from the court below on the same facts.[9] It is respectfully submitted, therefore, that this Petition is clearly within the first clause of Rule 19, 1(b), and that it comes within the reach of this Court's ruling in *Commissioner v. Tower*, 327 U.S. 280, 284 (1946): "Because of the various views expressed as to controlling legal principles in the decisions . . . , we granted certiorari . . . ". The present case involves a conflict between Courts of Appeal "that can be effectively resolved by the Supreme Court alone".[10]

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[7] First Trust Co. of St. Paul v. Minn. Historical Society, 146 F. Supp. 652,668 (D.C. Minn. 1956), *aff'd sub nom.* U.S. v. First Trust Co. of St. Paul, 251 F. 2d 686,691 (8th Cir. 1958).

[8] See Gunnell, *op. cit. supra* note 5, at 187.

[9] *Id.* at 188. See also Pilpel, *But Can You Do That?*, PUBLISHERS' WEEKLY, Dec. 26, 1960, p. 31 (" . . . the speeches dealt with subject matter with which the Admiral was officially concerned"); Finding of Trial Court below, noted in Paragraph 6 of "Statement of the Case", *supra*, Recent Developments, *Speeches Written by Public Official Are Copyrightable by Him Even Though Related to Content of his Assigned Duties*, 60 COLUM. L. REV. 398 (1960).

[10] Mr. Justice Harlan, *op. cit. supra* note 1, at 552.

II. Conflict with "applicable decisions of this court" (Rule 19, 1(b), fourth clause).

a. Definition of "official duty".

The decision below is in conflict with a whole line of "applicable decisions of this court" on the capstone legal issue decisive in the instant case: the legal criterion for determining when a high-ranking and policy-making Federal official acts within the scope of his official duties. The Court below ruled on this question as follows:

"It cannot be properly said, . . . that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions. If they are statements called for by his official duties or explanations as guides for official action, they are barred from copyright . . . We hold that none of these papers is a government publication."

The "applicable decisions of this court" appear in cases dealing with the liability of Federal officials for actions pursued in the course of their official duty. The issue arises when a Federal officer or employee makes a statement, writes a letter, or issues a press release which might be actionably libelous to anotl. . party. The typical ruling in such cases is that if the statement is made by a Federal officer in the course of his official duty, he is immune from the otherwise applicable liability for defamation. Thus, the basic legal question in this line of cases is: When is the Government officer or employee acting in his official capacity and within the scope of his official duties?

The underlying legal issue in the instant case is, thus, identical with the underlying legal issue in the Government libel cases, and therefore the rulings in the defamation cases are "applicable decisions of this court" under the fourth clause of Rule 19(1)(b).

In the leading case on the subject, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), Mr. Justice Harlan said that the test of official duty was whether it involved "action having more

or less connection with the general matters committed by law to his control or supervision".

This Court's latest relevant decision is *Barr v. Matteo*, 360 U.S. 564 (1959) where the question was whether press releases by the Acting Director of the Office of Rent Stabilization were within the scope of his duties and therefore "privileged" against a suit for libel. In finding that these press releases were within the scope of the official duties this Court ruled:

"It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" (at 575).

In a concurring opinion, Mr. Justice Black took special note that "the subject matter discussed in the release was germane to the proper functioning" of the government agency concerned. He continued: "It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. See Spalding v. Vilas . . . " (at 577).

In *Barr v. Matteo*, this Court cited with approval two former decisions from other fields, in which the underlying issue was the same. *United States v. Birdsall*, 233 U.S. 223 (1914) involved an employee's improper receipt of monies.

Mr. Justice Hughes set forth this Court's criterion of "official action" as follows: "To constitute it official action, it was not necessary that it should be prescribed by statute it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting . . . Nor

was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities . . . In numerous instances, duties not completely defined by written rules are clearly established by practice . . . " (at 230-31).

A similar rule was earlier enunciated in *United States v. MacDaniel*, 7 Pet. 1, 14 (1833), which was a suit by the Government for recovery on settlement of a Navy official's accounts.

The Courts of Appeals for the Second,[11] Seventh,[12] and Tenth Circuits[13] have also taken positions on this same underlying legal issue which are in direct conflict with the decision below in defamation and other cases, thus following the ruling of this Court in *Birdsall* and *MacDaniel* that the above noted definition of "official duty" is a general rule of law and is not limited to defamation cases.

As a matter of fact, there is serious question as to whether the court below has been consistent with its own previous decisions on this subject arising in malicious prosecution actions[14] as well as in Government defamation.[15]

The position taken before this Court by the U.S. Government on the very issue of the scope of a Federal employee's official duties is both pertinent and instructive. In *Barr v. Matteo, supra*, the Government's Petition for a Writ of Certiorari, at pages 11-12, stated:

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[11] Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949) (per L. Hand, J.), *cert. denied* 339 U.S. 949 (1950).

[12] U.S. v. Jones, 204 F. 2d 745, 754 (7th Cir. 1953) *cert. denied* 346 U.S. 854 (1953) (not a libel case).

[13] Preble v. Johnson, 275 F. 2d 275, 278 (10th Cir. 1960).

[14] Cooper v. O'Connor, 99 F. 2. 135, 139 (C.A.D.C. 1938), *cert. denied* 305 U.S. 643 (1938). This case was cited with approval in Hoffman v. Halden, 268 F. 2d 280, 300 (9th Cir. 1959).

[15] Glass v. Ickes, 117 F. 2d 273 (C.A.D.C. 1940), *cert. denied* 311 U.S. 718 (1941).

"In *Spalding v. Vilas*, supra, this Court held that, in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that the general legal authority for the act existed—*i.e.*, that the statements have 'more or less connection with the general matters committed by law to his control or supervision.' 161 U.S. at 498-9."

The Government's Brief on the merits interpreted the *Spalding Case* as follows:

" . . . it is not necessary that the official be under a positive legal duty to act; it is sufficient that general legal authority for the act existed . . . So far as official communications are concerned, the doctrine of Spalding v. Vilas has not been limited to heads of executive departments but has been applied to government officials of lesser rank." (at p. 12).

"And in Cooper v. O'Connor, 99 F. 2d 135 (CADC), certiorari denied, 305 U.S. 643, the court ruled that in order for an act to be within the scope of official duties it was not necessary that it be prescribed by a statute or specifically directed or requested by a superior officer" (at p. 17).

The Solicitor General claimed, in terms quite apposite to the instant case, the court below had adopted "an artificially restrictive test of 'line of duty', one which fails to take into account the nature of the officer's functions and the circumstances necessitating and justifying his decision . . . " (Brief, p. 16).

b. Respondent's speeches and his official duty.

Did Admiral Rickover's speeches have "more or less connection with the general matters committed by law to his control or supervision"? For a high-ranking Vice Admiral who is Assistant Chief of the Navy's Bureau of Ships for Nuclear Propulsion, and also Assistant Director of the Atomic Energy Commission's Division of Reactor Development, it scarcely needs any argument that the following speeches are connected

with "general matters" under his "control or supervision":

"Metallurgy in Atomic Power"
"Nuclear Power and the Navy"
"Nuclear Power—Challenge to Industry"
"The Naval Revolution"
"The Meaning of the Nautilus' Polar Voyage"
"The Shippingport Atomic Power Plant: Lessons from its Operation".

In what way are the Respondent's so-called "educational" speeches connected with his official concerns?

The following are excerpts from Admiral Rickover's speech entitled "Education: Our First Line of National Defense", delivered on December 11, 1958 [16]:

"Though I have never taken a course in 'education', *I have been running schools for years.* Everyone in my atomic power group has taken a hand at some time or other at teaching what he has first had to teach himself about the new science of engineering. *We have set up schools for our own engineers and for industrial people, as well as for the officers and men who will operate our nuclear ships. In our post-graduate program we teach the exacting requirements of reactor design, construction and management.*"

Respondent is a distinguished engineer of the U.S. Government. His educational concerns, he says, come out of this very fact:

"As any engineer would, I noticed many years ago that Russia, with her tremendous new educational program . . . was gaining momentum at a time when we were losing momentum. This shows up in the constant lengthening of lead time in this country . . . As an engineer, engaged in pushing through a new engineering project, it has long been obvious to me that we cannot shorten lead times . . . unless we find ways to remove the many roadblocks . . . Nearly all those roadblocks are caused by people whose education has not pre-

[16] Plaintiff's Exhibit No. 9, before court below, pp. 16-20, 22-23. (*Emphasis added*)

pared them for the extremely difficult problems which arise when we seek to progress beyond present levels of technology . . . "

What did Admiral Rickover, as a government official "engaged in pushing through a new engineering project", think was necessary to do his job better? "Our nuclear engineers had to be more broadly and more thoroughly educated . . . " Lacking this proposed remedy, the present situation directly affects his duties in carrying out his official responsibilities:

"It is no exaggeration to say that a major part of our time has been taken up with fighting for higher levels of performance which are resisted because their necessity is not understood . . . Resistance comes from . . . an inflexibility which has its roots in an educational system that does not prepare young people for life in our constantly changing world".

Respondent makes it crystal-clear that he is talking about *difficulties confronting him in recruiting his own official staff for his own official assignments:*

"I have interviewed more than two thousand young men in the last twelve years, all top men in their college class. My naval reactor engineering group presently numbers about 150. Since the men who came to see me had already passed through a number of previous interviews where all but the best were eliminated, it is evident that those who could not meet the requirements of the nuclear power project—and hence inferentially of any new development project—vastly outnumbered those who qualified."

"This experience made a deep impression on me. *It led me directly to a study of why our educational system produces so few men who are qualified to do the work we must do if we are to progress.* I found that our schools are the greatest 'cultural lag' we have today".

Your Petitioner does not wish to be misunderstood in this connection. Respondent is to be commended for his broad vision of the responsibilities placed upon him by the enormously important tasks committed "to his control or supervision". But he cannot have it both ways. If while perform-

ing his duty he acts as if education is part of his job[17] then he cannot elsewhere validly contend that education is solely an avocational interest. The speeches involved in this litigation are all clearly within the scope of duty committed to Respondent's "control or supervision."

c. Official duty of policy-making public official.

In still another respect, moreover, the court below failed to follow "applicable decisions of this court". We have already quoted from Mr. Justice Harlan's opinion for the Court in *Barr* concerning the broader interpretation that must be given to the scope of duties of "a policy-making executive official", 360 U.S. at 575. In the same decision he also stated that "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails" (p. 573).

The Respondent is and was a highly important official of two major agencies of the Government, both of which are engaged in a wide range of engineering and educational activities, both internally and externally. In the course of his general duties with the Navy Department and the Atomic Energy Commission, the Respondent participates in the formulation and execution of policies and programs critically affecting the present and the future of the Nation. In virtually everything he does he necessarily, by virtue of his high-level policy-making post, has a wide exercise of discretion.[18] The higher the official the higher the trust placed in him, the higher his responsibilities, and the broader the interpretation of his scope of official duties and responsibilities.

Whatever may be the relevance of the "works-for-hire"

[17] Counsel for Respondent said before the Trial Court: "The Admiral's interest in the subject of education . . . was stimulated by his experience in the Navy. In recruiting scientific personnel for his work on nuclear propulsion no one can say that he is not interested in improving the Naval Service . . . ", Brief for Appellant and [Joint] Appendix, Below, pp. 47-48.

[18] See Recent Developments, *op. cit.* supra note 9, at 400.

doctrine, adopted by the court below, for private employment, or even in low-level and purely ministerial public employment, it clearly does not apply to high-level and policy-making positions such as that occupied with such distinction by the Respondent. In addition to the broad substantive scope of their responsibilities, such high-level public officials have an implicit duty[19] to enlighten the American people through public statements on matters "having more or less connection with the general matters committed by law to his control or supervision."

It is respectfully submitted that the Court of Appeals in the instant case has seriously narrowed and misconstrued the "applicable decisions of this court", as well as the doctrine accepted by the United States for its own determination when an individual Government official is acting within the scope of his official duties.

This Court has stated that a Government employee's official duty includes "action having more or less connection with the general matters" entrusted to that employee. This Court has also ruled that no specific requirement is necessary to do the particular act involved and that no specific direction from a superior is necessary to qualify such action as official. Contrary to such rulings of the Court, however, the Court of Appeals below specifically rejected this test[20] and required that the action be "called for by his official duties" or that they be "explanation as guides for official action". Therefore the decision below is "in conflict with applicable decisions of this court."

III. Important questions of federal law not settled by this Court (Rule 19. 1(b), third clause).

The interpretation of Federal statutes is a customary basis-

[19] *Id.*

[20] The court below said: "It cannot be properly said . . . that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions."

for granting a writ of certiorari where novel, unsettled and important questions are presented,[21] especially where their authoritative solution by this Court is a matter of major importance to the American public as a whole.[22] In such instances, said Chief Justice Hughes, "review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants."[23]

a. Meaning of "Government publication" is unsettled.

The terms "Government publication" (in the Printing Law, 44 U.S.C. 58) and "publication of the United States Government" (in the Copyright Law, 17 U.S.C. 8) have been on the statute books since 1895 and 1909, respectively, but they are not defined in the statutes and their meaning "remains unanswered to the present day".[24] There is urgent "need for a comprehensive and workable definition of 'any publication' of the Government".[25] The "confusion that has arisen as to the meaning of 'Government publication'"[26] has led the Copyright Office to express dissatisfaction with the law's present unsettled state:

"The term 'Government publication' in the Printing Law, and the corresponding term 'publication of the United States Government' in the Copyright Law, as used in connection with the prohibition of copyright, have proved to be ambiguous. Within the context of the Printing Law, 'Government publication' has been construed as including all material published by the Government. From the standpoint of the copyright prohibition

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[21] ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (Wolfson and Kurkland ed. 1951) § 350.

[22] See Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

[23] Letter to United States Senate from Chief Justice Hughes, March 21, 1937, Sen. Rep. No. 711, 75th Cong., 1st Sess., p. 38 et. seq.

[24] Stiefel, *Piracy in High Places—Government Publications and the Copyright Law*, 24 GEO. WASH. L. REV. 423, 440 (1956).

[25] Gunnell, *op. cit. supra* note 5, at 183.

[26] Berger, COPYRIGHT IN GOVERNMENT PUBLICATIONS, Copyright Office, Study No. 21 C, p. 6 (mimeo. Oct. 1959).

this definition seems unsatisfactory since it would include privately-owned material when used in a document published by the Government; and it would exclude material produced or owned by the Government if it were published through private channels only".[27]

That clarification of the precise legal question at issue in this case is necessary has been emphasized by the Copyright Office.[28] The court below itself called attention to the need for a definition of the statutory term: "No clarification of the meaning of 'publication of the United States Government' appears in the Rules and Regulations of the Copyright Office".[29]

From the standpoint of the public, the press, and the Government [30] definitive interpretation by this Court is both desirable and necessary. The circumstances indeed cry out for such statutory construction by this Court.

Petitioner respectfully calls this Court's attention to "the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations." [31] Petitioner will attempt to show two serious results that will accrue from the decision of the court below:

That its test is impossible to apply and therefore only adds to the existing confusion, and

that the decision below fastens upon the vast system of evasion of the present law.

b. The decision below is impossible to effectuate.

The definition of a "Government publication" adopted by the court below is that it is a publication "*commissioned* or printed at the cost and *direction* of the United States. These would be *authorized* expositions . . . " (emphasis added).

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[27] *Id.* at 22.

[28] *Id.* at 23.

[29] See text associated with footnote 16 of opinion of Court below.

[30] See Mr. Justice Frankfurter's comment in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) ("Wise adjudication has its own time for ripening.)

[31] Cited from Chief Justice Vinson, *op. cit. supra note* 3.

Elsewhere the court says that they must be "*called for* by his official duties" (emphasis added).

The authoritative way to determine what is "called for" is to look to the official job description established by the employing Government agency for the employee involved. But, as a general rule, this information is virtually impossible for anyone not in the Government itself to obtain and for very few within the Government. Under express authorization of Presidential Executive Order, [32] the U. S. Civil Service Commission has issued to all government agencies instructions that "no one will have access to them [employees' Official Personnel Folders] except as authorized for official use." [33] In the Navy Department, for example,

"Information from an employee's personnel records may not be disclosed to persons other than authorized Federal employees without the employee's consent except as provided in NCPI 290, 5-8 and as follows: . . . (4) . . . and others having a legitimate reason for requesting such information, and who present proper credentials, may be given information regarding the employee. Such information should usually be limited to status, tenure and verification of the employee's salary." [34]

Thus, the test enunciated by the court below requires access to confidential employee personnel records properly forbidden under present official regulation. Therefore, the court's rule of law is for all practical purposes ineffectual. Instead of resolving the issue, it only compounds confusion.

c. Decision below fails to stem evasions of Copyright Law.

A system of substantial evasion of the Printing and Copy-

[32] Executive Order No. 10561, Sept. 13, 1954, 3 C.F.R. 71.

[33] U.S. Civil Service Commission, Federal Personnel Manual, R-1-40.

[34] Navy Civilian Personnel Instruction #290 (July 1960). Section 5-8, referred to in the above quoted language, deals with lists of names, salaries, titles and status; even in this connection § 5-8(b) provides: " . . . Lists for private purposes should be furnished only . . . if employees would not be disadvantaged by being listed."

right Laws prevails today in respect of copyrighting governmental publications. The Copyright Office reports:

"As shown by registrations in the Copyright Office, copyright has been claimed in a substantial number of works (chiefly historical, instructional, or technical materials) which were prepared by employees of a Government agency or a quasi-governmental organization and were used or published by the agency or organization." [35]

Sometimes, it is pointed out, the Government agency itself sponsors the private copyrighting by the government employee[36] for a variety of reasons largely related to efforts to evade the the use of the Government Printing Office's facilities.[37] The evasion of statutory copyright restrictions has gone so far within the Government as to include a formal Budget Circular issued by the Director of the Bureau of the Budget in 1943 recommending private publication instead of compliance with the law in order "to avoid the expense of printing and distributing a Government publication".[38]

Thus, a vast system of conscious as well as unconscious evasion of the restrictions on copyrighting of "Government publications" is practiced both by Government agencies as well as by their officers and employees. Sometimes the works involved are openly described as official government reports or documents; other times this fact is concealed or not revealed. This illegal practice of by-passing the restrictions on copyrighting of government publications developed out of the absence of any definition by this Court of the meaning of "Government publication" in the applicable laws. Whatever the etiology of this situation, the decision and opinion of the court below not only fail to help curb it but even give it sustenance.

The following are examples of current practice:

1. An official history of the United States Army in World

[35] Berger, *op. cit. supra* note 26, at 12-13.
[36] *Id.* at 13.
[37] *Id.* at 14.
[38] *Id.* at 14.

War II, written by the Assistant Chief of the Office of Military History while occupying that post, and published by the U. S. Government Printing Office for the Department of the Army, was copyrighted in the name of the government employee-author. See Appendix E for photo-copies of the title page and the copyright notice of this Government publication.

This is but a single example of a widespread current practice whereby publications of the Office of Chief of Military History, Department of the Army, are printed as avowedly government publications, but under copyright of individuals. See Appendix F for list of names of books, authors and copyright holders in which this evasive practice has been pursued.

2. A similar practice of evading copyright restrictions prevails in the Navy Department. For example, the book How To SURVIVE ON LAND AND SEA was authored by the "Office of Chief of Naval Operations, U. S. Navy", but it was copyrighted in 1943 and in 1951 by the U. S. Naval Institute, a private non-profit organization. A partial list of the Institute's publications is incorporated in Appendix G.

3. The Army Air Forces in World War II, through its Historical Division, assembled a seven-volume history of the record of the AAF in World War II. All seven volumes were privately published under copyright restrictions. See Appendix H for a reproduction of announcement about these volumes.

4. The Atomic Energy Commission and related agencies have likewise been party to private publication and copyrighting of official materials despite the provisions of the copyright law. The original Smyth report, for example, which was subtitled "The Official Report on the Development of the Atomic Bomb under the Auspices of the United States Government, 1940-1945" was privately published and copyrighted. See Appendix I. When the Atomic Energy Commission produced the first complete reactor engineering reference book, it was offered to the public by a commercial publisher under private copyright. See Exhibit J for an extract from the announcement of this book.

The practice of by-passing or evading the statutory restrictions on copyrighting of official publications is followed by other Government agencies as well.

5. To the Petitioner's best knowledge and information, for instance, there are no less than 48 books by scientists who performed work for Government atomic energy projects which have been privately copyrighted. The following title is an example: CRYOGENIC ENGINEERING (1959), prepared by the National Bureau of Standards, U. S. Department of Commerce, for the Atomic Energy Commission.

6. The Radiation Laboratory Series, 25 books arranged for by the U. S. Office of Scientific Research and royalties for which are paid into the U. S. Treasury, are privately copyrighted and published.

7. The Rand Corporation is a Government-sponsored non-profit corporation which prepares reports for various official agencies, including the Air Force, under contract. Where it submits a report which it has been paid specifically to prepare, the Rand Corporation copyrights the report thus furnished to the contracting government agency.[39]

8. Private copyright of clearly official documents has spread to the Congress. Appendix K is a photocopy of the title page of SPACE HANDBOOK: ASTRONAUTICS AND ITS APPLICATIONS, which was copyrighted although it is a Staff Report of a Congressional Committee, published by the Government Printing Office as a document of the Congressional Select Committee on Astronautics and Space Exploration.[40]

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[39] For the Copyright Office's doubts as to the legality of this practice, see Berger, *op. cit. supra* note 26, at 23.

[40] The Congressional *vademecums* on parliamentary procedure were privately copyrighted, but only after specific legislative permission from the Congress. CANNON, PROCEDURE IN THE HOUSE OF REPRESENTATIVES, H. Doc. No. 122, 86th Cong., 1st Sess., was privately copyrighted by Congressman Cannon (although published by the U.S. Government Printing Office), pursuant to authority granted in 62 Stat. 1052 (1948); 73 Stat. 20 (1959). Likewise with the approval on May 2, 1958 of the private copyright of WATKINS AND RIDDICK, SENATE PROCEDURE, PRECEDENTS AND PRACTICES, Sen. Doc. No. 93, 85th Cong., 2nd Sess.

Your Petitioner's facilities for uncovering such examples are, of course, very limited. But the known facts clearly disclose a creeping paralysis of statutory restrictions upon copyrighting of Government publications. The decision of the court below will, if permitted to stand, cause serious mischief through encouragement to copyright by stratagem and to growing evasion of the provisions of the Printing and Copyrignt Laws dealing with the noncopyrightability of Government publications. It will place a premium on subterfuge, artifices and machination to dodge copyright restrictions on official works.

The public interest requires an end to the continuing erosion of statutory requirement and the danger of even worse evasion of law. This Petition presents the opportunity for authoritative construction of the applicable statutes by this Court.

IV. Unsettled Constitutional questions.

This Court's most delicate and important function is called into exercise with the resolution of unsettled questions of Constitutional law. Such a question, not even touched by the court below,[41] appears in the instant case.

Does the First Amendment's guaranty of Freedom of Press permit a Government official to arrogate to himself a private copyright monopoly over the use of "Government publications"? Does it abridge the First Amendment for a Government agency which employs such official to acquiesce in or be party to such private copyright of "Government publications" by its employees or others?

a. Freedom of Press guarantees the people's right to know what their Government officers do and say in their official capacity?

1. The First Amendment established the Constitutional right of freedom of the press. The nation's founders saw two vital needs for such protection: (1) that a free society cannot survive without full knowledge of its Government's activities, and (2)

[41] See Recent Cases, 73 HARV. L. REV. 1219, 1220 (1960).

that a free press was the people's only instrumentality for obtaining such information.

2. James Madison was chairman of the committee that drafted the First Amendment (Patterson, *Free Speech and a Free Press* (1939), 121) and presumably knew its purpose. He wrote: "the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right . . . " 6 *Writings of James Madison* (1906 ed.), 398.

3. The essentiality of a free press for a free people has long been a key element in this Court's rulings. In *Associated Press v. United States*, 326 US 1, 20 (1945), Mr. Justice Black wrote for the Court:

"The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

4. Freedom of the press was not designed as a special privilege for the publishing business, but rather as an extension of the personal rights of each American. It is a guaranty of the individual's right, and was thus joined in the First Amendment with the individual's rights of free speech, assembly and petition.

The press itself is fully aware of this obligation to the public, as witness the statement of Elisha Hanson, counsel for the American Newspaper Publishers Association:

"The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in printed form. Publishers are but trustees of this right. Thus the press not only has the obligation to gather and disseminate information of general public interest, but it has the greater obligation—that of preserving the right of the people to have a press free from restraint in the performance of its function and from whatever source restraint may spring." [42]

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[42] *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary*, 41 ABA JOURNAL 217, 218 (1955).

Thus, while the American people do not appear as a party to this law suit, it is *their* rights which are at stake.

5. The Constitutional Freedom of the Press is indivisible. The press is not free, this Court has said, if any classification of publisher is denied free press: "The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), per Hughes, Ch. J.

Elsewhere this Court has said: "Freedom to publish means freedom for all and not for some." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

b. Right of access to Government publications is a sine qua non of a free press and is protected by the First Amendment.

1. The *New York Times* once editorially said that freedom to produce a blank page is hardly freedom of the press. May 31, 1957, § 1, p. 26, col. 3. The right to publish and the right to distribute have already been clearly affirmed as part of Freedom of the Press. *Lovell v. Griffin*, supra, at 452; *Winters v. New York*, 333 U.S. 507, 509 (1948).

The First Amendment would be sterile today if its sanctions were limited to the mere act of printing. The Zenger case decided that over 200 years ago. This Court has not so limited Freedom of Press. *Lovell v. Griffin*, supra, at 452. Freedom of Press means more than freedom to print; it includes *freedom of access* to materials officially and publicly released by the United States Government. Anything less would hamstring the public's right to know and undermine the fundamental objective of the First Amendment.

2. The United States Government has itself urged upon this Court the very point here being urged by your Petitioner. In its Brief before this Court in *Barr v. Matteo, supra*, the Solicitor General said:

"The interest of the people in having access to the facts is at stake, for press releases and press conferences by subordinate

officials exercising policy-making functions have become an important and accepted means of communication. The decision below, if allowed to stand, will necessarily tend to curtail the dissemination of controversial information which the public is entitled to receive.

"In recent years, Congress has given repeated emphasis to the public's 'right to know'. Legislative bills have included 'a positive affirmation of Congress' intent that the people be enabled to know what is going on in their Government . . .' H. Rep. No. 1770, 85th Cong., 2d Sess. 23. The importance of a free flow of information to the public was recently expressed by a congressional committee in these terms (H. Rep. No. 1758, 85th Cong., 2d. Sess. 17):

" 'That the people must know' is a premise which is cemented into the foundations of any working democracy. James Monroe put the principle very well in his seventh annual message on the state of the Union: 'To the people, every department of the Government and every individual in each are responsible, and the more full their information the better they can judge the wisdom of the policy pursued and the conduct of each in regard to it.'

"These statements do not unduly emphasize the importance of a public official's informing function . . . " (at pp. 19-20).

3. A distinguished Federal judge has written on this subject in terms which are precisely applicable here:

"Governmental activities do not allow differentiation between what is private and what is public. All the business which persons in public office, high or low, perform is of a *public nature*. So there is no conflict, as in the case of privacy, between the individual rights and the public's demands—but rather between the right of the public to be informed and the arrogative right of persons in public office to withhold information."

"The adoption in the Federal and State constitutions of the guarantee of freedom of speech and press and of the other democratic rights led to the recognition of the right of access

and publication of the activities of public men and public bodies."

"If those in public office arrogate to themselves the unrestricted power to determine what information shall be made known to the public, it would become too easy for them to conceal their conduct and misconduct,—their deeds and misdeeds."[43]

4. This Court has said that First Amendment rights must be "guarded with a jealous eye," *A.F.L. v. Swing*, 312 U.S. 321, 325 (1941), per Frankfurter, J. A liberal interpretation of such rights is "the only conclusion supported by history": "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263, 265 (1941), per Black J.[44]

First Amendment rights have been persistently protected by this Court from erosion by indirection as well as by direct act.[45] "Sophisticated as well as simple minded" evasions of Constitutional rights have been condemned.[46]

5. The history of the struggle for Freedom of the Press bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it. *Freedom of Press must embody free access to facts concerning the Government's operations and to all officially released Government materials.*

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[43] Yankwich, *Legal Implications of, and Barriers to, The Right to Know*, 40 MARQUETTE L. REV. 3, 6, 33, 35 (Summer 1956).

[44] See also Baxley v. United States, 134 F. 2d 937, 938 (4th Cir. 1943).

[45] Guinn v. United States, 238 U.S. 347, 361 (1915); Grosjean v. Amer. Press Co., 297 U.S. 233, 250 (1936); Speiser v. Randall, 357 U.S. 513, 518 (1958). See also Milwaukee Publication Co. v. Burleson, 255 U.S. 407, 430-31 (1931) (Brandeis, J., dissenting); United States v. Rumely, 345 U.S. 41, 58 (1953) (Douglas, J., concurring).

[46] See Mr. Justice Frankfurter's comment, Lane v. Wilson, 307 U.S. 268, 275 (1939).

c. Decision of Court Below Abridges Freedom of the Press.

1. If Admiral Rickover has copyright monopoly over his speeches relating to his official responsibilities, he can deny to anyone, including the daily press and news periodicals, the right to quote these speeches. That he granted such limited right is a matter of grace on his part, not a question of right on the part of the press. As the *Dallas* (Texas) *Morning News* stated editorially: "Application of this rule in the past would have deprived the nation of George Washington's Farewell Address and Abraham Lincoln's imperishable remarks at Gettysburg." (Dec. 7, 1959).

By sanctioning Respondent's right to conceal or selectively to release officially published materials, the court below hobbles the public's right to know. *The Constitutional guarantee of a free press is lost if its effectiveness depends on the sufferance of those from whom the Constitution guaranteed the press freedom.*

2. In the present case Respondent exercised his copyright power to shut off all press rights or turn them on at will. When first he copyrighted the speeches, he allowed only "contemporary press use". Later he decided to change this permission to read "for newspaper or news periodical use". Brief for Appellant and [Joint] Appendix Below, p. 36.

Today Respondent favors the daily press; tomorrow he may turn on it. *A free press cannot exist on the basis of juggled and discriminatory permissions granted or withheld solely by the grace of a Government official.*

3. The opinion of the court below, if allowed to stand, permits a Government official to

dictate or manipulate the press's use of an officially-issued press release,

make it available only to those who speak favorable of him and interpret it in an "approved" manner, and

limit its use to political, social, religious or other favorites.

In other words, the opinion means that a Government official can deny, limit or restrict the press' access to officially released and sanctioned press releases except on his own terms.

4. This Court has warned against the dangers in limiting Government information to what a Government official pleases to make known. In a case arising out of the Teapot Dome scandals of the 1920's the Court said: "Experience has taught us that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; . . . " *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

5. Inconspicuous suppression of public documents can effectively be achieved through copyright. The law permits copyrighting of materials that are not printed. Moreover, a great amount of copyrighted material is not accessible to the public and is not even available for examination at the Library of Congress because the Library cannot possibly store all copyrighted material and must return or discard countless thousands of such works. In addition a substantial portion of copyrighted material never appears in the official catalog cards filed in the reading rooms of the Library of Congress and furnished to the nation's libraries. For example, not one of Respondent's 20 speeches listed in Appendix D, copyrighted by him as of the beginning of October, 1960, was listed in the official reading room card files of the Library of Congress or in cards furnished to the nation's libraries. *For practical purposes, therefore, the result is actual suppression of the speeches of high-ranking Federal officials since the public at large has no means of becoming aware of them or of obtaining access to them.*

6. Thus, by action of Respondent Government official, and because of the failure of the United States Government to prevent such behavior on the part of its employees, your Petitioner has been deprived of rights guaranteed to it by the First Amendment.

7. The peculiar genius of the Bill of Rights is its adaptability to the problems of each successive generation of Americans.

This generation's special problem is the public's right of access to official government information. The very nature of First Amendment rights calls for their expansion to meet new and undecided issues. Such is this case.

SPECIAL REQUEST

Your Petitioner has attempted to show the varied interests of the United States Government in the underlying issue of this case, as follows:

1. As an employer, interested in the scope of official employment;

2. As the administrator of the Copyright Office, with obligations of interpreting the laws affecting copyright;

3. As the operator of the Government Printing Office, with the need to know the meaning of the statutory term "Government publication";

4. As the Government of the United States, whose own actions, and whose employees' actions, have been alleged to be unconstitutional; and

5. As the representative of the American people, responsible for aiding in the equitable, just, and effective enforcement of law.

Consequently, it is respectfully suggested to the Court that it consider whether the Solicitor General should be invited to submit a brief *amicus curiae* in this proceeding, either in connection with this Petition or, in the event the Petition be granted, on the merits.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted.
STANLEY B. FROSH
HARRY N. ROSENFIELD

January 1961.

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,463

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as Public Affairs Press, APPELLANT

v.

VICE ADMIRAL HYMAN G. RICKOVER, APPELLEE

On Appeal from the United States District Court for the District of Columbia

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Decided October 20, 1960

Mr. Stanley B. Frosh for appellant.

Mr. Joseph A. McDonald, with whom *Mr. Edwin S. Nail* was on the brief, for appellee.

Before Mr. Justice Reed, retired,* and Washington and Danaher, Circuit Judges.

Mr. Justice Reed, sitting by designation: This is an appeal from the judgment of the United States District Court for the District of Columbia dismissing after trial on the merits a complaint for a declaratory judgment.[1] Appellant, an educational publishing organization, complained on January 16, 1959, that appellee, an admiral of the United States Navy, refused appellant the right to "use, quote or publish" speeches appellee had made "in his capacity as an admiral." Appellant

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* Sitting by designation pursuant to Sec. 294(a), Title 28, U.S. Code.

[1] Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601.

claimed the right to publish because appellee used the "facilities, information and data obtained . . . in connection with his duties as a public official." Appellant further alleged that the speeches have been released to the public press and therefore "are in the public domain and not subject to any curtailment as to use."

Judgment was sought "declaring defendant may not restrict the quotation from these public speeches, either in full or in part, in book form or otherwise, once they have been delivered publicly"; that "copyright" restrictions on his public speeches be declared removed.[2]

After an answer denying portions of the complaint, an agreed statement of facts was filed. That statement showed that the appellee during the pertinent period was a vice admiral on active duty in the Navy Department as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and Assistant Director for Naval Reactors, Division of Reactor Development, United States Atomic Energy Commission. From October 20, 1955, to the commencement of this action, Admiral Rickover delivered twenty-three speeches in public.[3] Some months prior to the

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[2] Jurisdiction and the existence of actual controversy is not contested. 28 U.S.C. § 1338; White v. Kimmel, 193 F. 2d 744 (9th Cir., 1952).

[3] (1) Metallurgy in Atomic Power, October 20, 1955, National Metals Congress of the American Society for Metals; (2) Nuclear Power and the Navy, October 27, 1955, San Francisco Council of the Navy League, the Chamber of Commerce and the Commercial Club; (3) Engineering and Scientific Education, November 22, 1955, the Thomas Alva Edison Foundation, Inc.; (4) Lead Time and Military Strength, January 12, 1956, The Society of Business Magazine Editors; (5) Nuclear Power and the Navy, August 16, 1956, Bellefonte Sesquicentennial; (6) The Education of Our Talented Children, November 20, 1956, The Institute Sponsored by the Thomas Alva Edison Foundation, Inc.; (7) Nuclear Power—Challenge to Industry, January, 1957; (8) The Challenge of Nuclear Power, March 1, 1957, Westinghouse Science Talent Search Award Ceremony; (10) Energy Resources and Our Future, May 14, 1957, Annual Scientific Assembly of the Minnesota State Medical Association; (11) The Naval Revolution, September 14, 1957, American Legion Naval Affairs Committee; (12) International Communication Award

institution of this suit, July 9, 1958, he had contracted with E. P. Dutton & Co., Inc., to publish a book to be known as Addresses of Admiral Rickover, based in part on certain of said speeches. The contract asserted that ownership of the speeches was in Admiral Rickover. On December 1, 1958, the Admiral filed, subsequent to their delivery, an application for registration of a claim to copyright in a compilation of the first 22 of the speeches in question with a copyright notice. The appellee recognizes that the "compilation did not revive any exclusive rights held in such material prior to" previous publication. The same day appellee filed application for registration of speech No. 23. This last speech was delivered December 11, 1958. On January 12, 1959, a book published by E. P. Dutton & Co., Education and Freedom, based largely on a number of the speeches in controversy, was offered for copyright in the name of Admiral Rickover and registered.

The agreed statement of facts shows that the writing of these speeches was done at home after normal working hours or while traveling. It was agreed:

"The speeches were written by the Admiral in longhand.

"Christopher Columbus," October 12, 1957; (13) The Balance Sheet on Education, November 22, 1957, The Institute Sponsored by the Thomas Alva Edison Foundation, Inc. at the Engineering Society of Detroit; (14) Revolution at Sea, December 5, 1957, Overseas Press Club; (15) Education in the Nuclear Age, December 6, 1957, Dedication of Nuclear Power Training School; (16) European and American Secondary Schools—A Comparison, March 23, 1958, Fiftieth Anniversary, St. Alban's School; (17) The Truth Shall Make You Free, April 19, 1958, The Inauguration Ceremonies of Polytechnic Institute of Brooklyn; (18) The Meaning of Your Profession, June 14, 1958, Stevens Institute of Technology; (19) Investment in Human Resources, September 25, 1958, Engineers Club of St. Louis; (20) The Meaning of the Nautilus' Polar Voyage, September 29, 1958, Altoona Lions Club; (21) A Common Heritage, October 23, 1958, Columbia University Forum; (22) Theodore Roosevelt—Modern American, October 27, 1958, Presentation, Theodore Roosevelt Distinguished Service Medal; (23) Education—Our First Line of Defense, December 11, 1958, The Harvard Club of New York City.

A large part of the speeches were typed by Mrs. Rickover at home. The typewritten material plus some handwritten portions were brought in to the Admiral's office for the typing of a final copy and the preparation of a multilith master by the Admiral's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on Government duplicating machines."

* * * *

The defendant admits that it was his practice to have his speeches as prepared for distribution bear his name, his rank in the United States Navy and his title in the Atomic Energy Commission, that the speeches as distributed customarily bore a statement 'for release' giving the date and frequency the time of the release and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission."

After multilithing and at or before delivery, all speeches except Nos. 7 and 12 in footnote 3, supra, were distributed. The statement of agreed facts shows as follows:

"Certain of the speeches, approximately sixteen in number, were also made available to the press through the Public Information Office of the Department of Defense or of the Atomic Energy Commission, or both. In distributing the speeches, Admiral Rickover mailed some to individuals who had requested copies or who[m] Admiral Rickover believed would be interested in the subject. Some were sent by Admiral Rickover, approximately 50 in each case, to the sponsor of the speech to be made available to the press and others at the place where the speech was to be delivered. Some speeches were sent to the Press Club in Washington by Admiral Rickover for the use of representatives of the press."

Each speech was cleared by the Department of Defense, Office of Security Review. This was done under § 1252 of the General Regulations of the Navy which, inter alia, provide:

"3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accord-

ance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department."

There was also a Department of Defense Directive in effect during the time the speeches were delivered.[4]

Admiral Rickover had duties of supervision and inspection that could be carried out at or near the various points of delivery, and arrangements were made to make the speeches in free or "off duty" hours. No transportation costs were paid by Admiral Rickover in connection with his addresses. Honoraria, when offered, were paid directly to charities specified by the Admiral.

The District Court in its opinion determined that the addresses listed in note 3 fell into a class of literary productions "that arise out of [the author's] official actions, although writing the book or delivering the address in question, is no part of his official duties."[5] Therefore, the trial court determined these

[4] "V. *Writing for Publication by Defense Personnel, as Individuals.* Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD (PA), for review and clearance to avoid any possible violation of military security." DOD Directive No. 52,309, Aug. 17, 1957.

[5] 177 F. Supp. 601, 604.

addresses were not governmental publications. It was also held that the issue of the press releases and the delivery of the speeches were not "an abandonment of the literary property or a dedication to the public." [6]

I.

Underlying an analysis of the respective contentions of the parties here is the legal right of an author of books, lectures or addresses in his unpublished writings. Copyright, the exclusive right of an author to publish for a limited time his work, did not exist at common law even though at common law an author had a property right in his unpublished work.[7] This property right enabled an author to control the disposition of his work until such time as he released it to the public. If this right of control had not ended with publication, there would have been no need of copyright protection. The property right would have been perpetual. The problem of balance between the rights of authors to the fruits of their efforts and the right of the public to have opportunity for learning or diversion was solved by adoption of the copyright acts.[8] Although after publication the rights of authors in the United States are now measured by the Copyright Act, their common law right to the first publication has been preserved.[9] We have not depended primarily upon the flexibility of the common law

[6] Id., at 606.

[7] Mazer v. Stein, 347 U.S. 201, 214-215; Wheaton v. Peters, 8 Pet. 591, 657, 662; White Smith Music Co. v. Apollo Co., 209 U.S. 1, 15, 18-20 (concurring opinion). The weight of the English cases supports this view. See Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.); Donaldson v. Beckett, II Brown 129, 1 Eng. Rep. 837 (1774 H.L.); Jefferys v. Boosey, 4 H. L. Cas. 815, 961 (1854); Copinger and Skone James, Copyright (9th ed., 1958) 2, 16.

[8] See Holmes v. Hurst, 174 U.S. 82, 85.

[9] 17 U.S.C. § 2: "*Rights of author or proprietor of unpublished work.* Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

in the development of copyright. This right to choose the time and manner of releasing to the public the labor product of the mind protects against literary piracy.[10]

Speeches and lectures for oral presentation may be copyrighted under the Copyright Code.[11] Their texts, of course, may be copyrighted as writings under § 4.[12] Were the Admiral a private citizen, therefore, no substantial question would exist as to the susceptibility of these works to statutory copyright. The cases make it clear that an author's common law copyright may exist in lectures and other works that are performed as well as in writings.[13] Our consideration turns first to whether the lectures' general susceptibility to copyright is affected by the Admiral's status as a high government official and the nature of the material discussed. Narrowly stated in terms of the statutory provisions, were these speeches or their written texts publications of the United States Government in which, under § 8 of the Code, no copyright shall subsist.

In these present case Public Affairs Press asserts first, that as these speeches "resulted from his official responsibilities" they should be classified as a "publication of the United States Government" under 17 U.S.C. § 8, which provides, "No copyright shall subsist in any publication of the United States Government."[14] This generalization creates a sea of troublesome questions. Such publications range from the Presidents' messages on the State of the Union, the Congressional Record, departmental pamphlets, maps, regulations, and judicial de-

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[10] Exploitation of the work of others has been not infrequent in England and the United States. See Dickens v. Hawksley, [1935] 1 Ch. 267, 287; Macmillan & Co. v. Dent, [1907] 1 Ch. 107; Holmes v. Hurst, 174 U.S. 82; Mifflin v. R. H. White Co., 190 U.S. 260; Mifflin v. Dutton, 190 U.S. 265.

[11] 17 U.S.C. § 12.

[12] 17 U.S.C. § 4: "The works for which copyright may be secured under this title shall include all the writings of an author."

[13] Ferris v. Frohman, 223 U.S. 424, 430; Nutt v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929).

[14] This provision appeared as § 7 of the 1909 Copyright Act, 35 Stat. 1077.

cisions to forms for the moving of admission to the bars of the various courts. Apparently the language of the provision originated in the Act for Public Printing, 28 Stat. 601, § 52.[15] It is designed to achieve in a democracy that depends upon accurate public knowledge the broadest publicity for matters of government. No clarification of the meaning of "publication of the United States Government" appears in the Rules and Regulations of the Copyright Office.[16] The provision grew out of a "confused entanglement" over the sale of the stereotype or electrotype plates desired by Representative James D. Richardson for use in a publication "prepared, compiled and edited by him on behalf of the Joint Committee on Printing."[17]

The language of the original statute on printing—"No . . . Government publication shall be copyrighted"—seems to refer to a publication actually produced by the Public Printer.[18] The Printing Office provision seems to mean, if read naturally, "produced in that office."[19] The Copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by governmental authority.[20] The second section of

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[15] See the discussion in Berger, Copyright in Government Publications, in Copyright in Certain Works, General Revision of the Copyright Law, Copyright Office, Study No. 21 (A-C), p. 4 (1959).

[16] 37 C.F.R. § 201.1-201.8 (1960).

[17] I Messages and Papers of the Presidents I. II. III (1913 ed., Bureau of National Literature) copyright 1897 by James D. Richardson. See Stiefel, Piracy in High Places, in ASCAP Copyright Symposium No. 8, p. 3, 25 (1957).

[18] See S. Rep. No. 1473, 56th Cong., 1st Sess.

[19] S. Rep. No. 1473, supra, p. 2:

"The Committee on Printing will not undertake to discuss the legal question here involved further than to say that the prohibition contained in the printing act was intended to cover every publication authorized by Congress in all possible forms. . . ."

[20] It would not seem to us that occasional use of a governmental secretary for transcribing or of multilithing machines for copies for publicizing the speeches would fall under the statutory concept of a publication by or at the cost of the United States.

§ 8 protects authors' copyrights against governmental use of copyrighted material.[21]

Both ordinary practice [22] and the decided cases support our conclusion.[23] Before any enactment as to governmental publication, the Supreme Court declared that federal judicial opinions as such, "published under the authority of Congress," were not copyrightable.[24] The Court returned the *Wheaton* case to the trial court, however, for determination of whether Mr. Wheaton had complied with copyright as to his own notes on the cases.[25] That action recognizes the right, outside of statutory allowance or negation, of a governmental employee to copyright comments on non-copyrightable governmental publications. In *Sherrill v. Grieves*, 57 Washington Law Rep. 286, 290 (Sup. Ct. D.C. 1929), an author's copyright on a pamphlet previously published by a governmental school for officers for use in local instruction with the author's consent was upheld against the contention that it was a governmental publication. The author was a government employee but the writing of the pamphlet was outside his employment. In *Sawyer v. Crowell Pub. Co.*, 46 F. Supp. 471 (D.C.S.D.N.Y. 1942), the court dealt with a map produced by government employees in the course of their duties, copyrighted by one employee and then published by the

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[21] "The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor."

[22] See the list of fifteen senior military officers who, while on active duty, were said to have published books relating to military experiences. 105 Cong. Rec. 15927-15928 (daily ed., Aug. 31, 1959). See 7 Decisions of Comp. Gen. 221, 223.

[23] See a thorough note on this case below, 60 Col. L. Rev. 398 (1960); 73 Harv. L. Rev. 1219 (1960). See a discussion of cases 24 Geo. Wash. L. Rev. 423, 443-447 (1955-56).

[24] Callaghan v. Myers, 128 U.S. 617, 649; Wheaton v. Peters, 8 Pet. 591, 668.

[25] Callaghan v. Myers, supra, at 650. See Mr. Justice Story on circuit in Gray v. Russell, 1 Story 11, 20-21, 10 Fed. Cas. No. 5728, p. 1035, 1039 (C.C.D. Mass., 1839).

Government with notice of that copyright registration. The court held that as the map "relates directly to the subject matter of the plaintiff's work" and was printed and engraved by the Government, the attempted copyright inured to the employer's benefit. Compare *United States v. First Trust Co. of St. Paul*, 251 F. 2d 686 (8th Cir. 1958), an action to quiet title, where it was held that a book of notes of exploration kept by Col. Clark was a private journal. He was an army officer, a member of the Lewis and Clark expedition, but Lewis was the commander. Lewis was instructed to keep notes by President Jefferson. This he did. Lewis also sent Clark's notes for the perusal of the President but with comments and directions that caused the court to hold they were to be treated as private notes rather than official, as Lewis' were. As the Clark notes were not shown to be kept in accordance with Clark's duties, the court held them not to be the property of the Government.

It cannot be properly said, as appellant asserted, that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions. If they are statements called for by his official duties or explanations as guides for official action, they are barred from a copyright. A perusal, even of the titles and the places of delivery alone, should be sufficient to show that these addresses were not governmental publications in that sense. The speeches themselves bear out this statement. We hold that none of these papers is a Governmental publication.

II.

The next question is whether Admiral Rickover has forfeited his right to a copyright on the twenty-two addresses delivered before December 1, 1958.[26] The Copyright Act, § 8, so far

[26] The word "forfeit" is adopted to avoid "dedication" or "abandonment" which seem to suggest purposeful release to the public. The purpose of a statutory "publication" is immaterial. National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 598 (2d Cir. 1951); Nimmer, Copyright Publication, 56 Col. L. Rev. 185, note 4 (1956).

as here important, provides, "No copyright shall subsist in the original text of any work which is in the public domain." The manuscript is the private property of an author until publication with all the attributes of ownership within the concept of personal property.[27] This right of authorship is lost—no doubt often inadvertently—when the owner puts his work in the public domain by publication without obtaining a copyright. The right of authorship become a copyright with similar individual privileges for the owner by publication and the affixation of the copyright notice.[28]

The only United States statutory definition concerning publication is not directly applicable. It is § 26 and applies to § 24 as to duration of copyright. It does give some indication of congressional thinking on the subject. It reads as follows:

"In the interpretation and construction of this title 'the date of publication' shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, . . . "

"Public distribution" is the phrase of importance in this case. In England there is a statutory definition in the 1956 Copyright Act, § 49(2)(c): "subject to the preceding paragraphs, a literary, dramatic or musical work, or an edition of such a work, or an artistic work, shall be taken to have been published if, but only if, reproductions of the work or edition have been issued to the public;" Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74.

An authoritative English textbook states the rule as follows: "Prima facie a literary, dramatic or musical work, or an edition of such a work or an artistic work, is published if, but only if, reproductions of the work have been issued to the public . . . . " Copinger and Skone James, Copyright, (9th ed., 1958), p. 21, 30.

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[27] Ferris v. Frohman, 223 U.S. 424, 434; 17 U.S.C. § 2, note 9, supra.

[28] 17 U.S.C. § 10.

In determining whether publication forfeiting the author's power to copyright the addresses has occurred, we must consider the intent of Congress to induce publication for general use by allowing a limited monopoly to enable authors to profit from their writings and the congressional enactment, § 8, which permits a copyright only when the writings have not been put into the public domain, that is, voluntarily released to the public by the author. The Supreme Court has said, a propos of a similar situation: "Such forfeitures are never to be inferred from doubtful language." [29] Nor should they be inferred from doubtful actions. A liberal attitude in protecting any work in its passage from the perpetual but non-productive absolute common law rights of an author to the limited but productive monopoly of the copyright is enjoined upon the courts by the purposes of the Copyright Act. However, an author's intent as to publication should not be given controlling weight against the effect of his acts.[30]

The agreed facts stated at pages 3 and 4, supra, show a wide distribution not only to the press but also to people generally who desired copies through interest in the subjects of the addresses. The handling of the addresses prior to December 1, 1958, when copyrighting was first attempted, indicates a studied effort not only to secure publicity for the contents of the addresses through the channels of information, but to go beyond customary sources of press or broadcasting in distributing the addresses to any interested individual. Publication, for measurement of the duration of a copyright, dates from a sale or when "publicly distributed" by the owner of the copyright.[31] Such a measure for the meaning of publication for release of authorship rights seems most consistent with the Act.

In *American Visuals Corp. v. Holland*, 239 F. 2d 740 (2d Cir. 1956), Judge Frank writing, it was held that a distribution

[29] Washingtonian Co. v. Pearson, 306 U.S. 30, 42.

[30] Cf. Roberts, Publication in the Law of Copyrights, ASCAP Copyright Law Symposium, No. 9, p. 121.

[31] 17 U.S.C. § 26, supra, p. 10.

of several hundred copies of an advertising scheme to prospective customers, apparently with suitable notice of copyright claim under § 10 of the Act, was sufficient publication to comply with the statutory requirement of publication for copyright.[32] Even though we follow the preceding opinion's suggestion that publication to gain a copyright requires less evidence of publication than publication to lose a common law property right, we have been unable to conclude that the distribution of almost all of his addresses was not a dedication to public use. This makes it unnecessary to consider whether the oral presentation alone would or would not be a publication under the Copyright Act.[33]

An important case from this Circuit, *Hirshon v. United Artists Corp.*, 243 F. 2d 640 (1957), discusses publication. Twenty-five hundred copies of a song were distributed in order to publicize it, p. 645: "All the record shows is that 2,500 copies of appellant's song were printed and that some [2,000] of them were distributed to broadcasting stations and professional musicians for 'plugging' purposes, chiefly through Broadcast Music Incorporated, named on the copies as a licensing agent. Not a single copy was sold. No license or other permission was given to anyone to perform or otherwise use the song. Nothing was said or done, beyond the described distribution, to give any recipient of a copy the impression that he could make any use of it without first obtaining the proprietor's license through the stated licensing agent." This was held a limited publication which did not vitiate the copyright.

The agreed statement of facts in the case under consideration shows no effort to limit distribution of the speeches delivered prior to December 1, 1958, but rather a willingness to make

[32] "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; . . . " 17 U.S.C. § 10.

[33] Cf. Ferris v. Frohman, 223 U.S. 424, 430; Nutt v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929); Nimmer, Copyright Publication, 56 Col. L. Rev. 185, 194-197 (1956); Kaplan, Publication in Copyright Laws, 103 U. Pa. L. Rev. 469, 473-479 (1955); Selvin, Should Performance Dedicate?, 42 Calif. L. Rev. 40 (1954).

them available to all who might be interested. Certainly when all of Admiral Rickover's acts of distribution are considered together—performance, distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches—it is difficult to avoid the conclusion that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain. There is no effort shown to protect the author's private right in any way, no limitation upon who might obtain copies. That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, "All claims to copyright waived." See *White v. Kimmell*, 193 F. 2d 744 (9th Cir. 1952).

Since the distribution was not limited in any way to a particular group, no question exists in this case as to the extent of any limitation so as to avoid "publication" in the copyright sense. Anyone was welcome to a copy.

Nor do we have any problem as to limited use of the addresses by the press for fair comment. The press was free to use the speeches in whole or in part for their news value. But such ephemeral use is far different from the unlimited distribution to anyone who was interested which is manifested by the agreed statement of facts. It is the complete absence of limitation on the use of the printed distributions by anyone at any time which destroyed the common law rights of the author.

III.

Copies of the speeches delivered after December 1, 1958, bore this sort of notice: "Copyright 1958, H. G. Rickover. No permission needed for contemporaneous press use. Above copyright notice to be used if most of speech reprinted." Copies of these speeches were deposited in accordance with the act. The appellant does not appear to contend that this notice does not contain all the formal elements required by § 19 of the Code. Rather, it asserts that these notices do not comply with the act because, in addition to the required elements, they also

contain a conditional permission to use the work. Appellant contends that the terms of this condition are vague, particularly "contemporaneous" and "press", and for this reason the entire copyright is invalid. No authority is cited for these contentions. The argument fails to distinguish between a valid and sufficient notice followed by additional, perhaps questionable, limitations and a notice which fails to comply with the specific requirements of § 19. There is not much merit to appellant's contention that the condition is vague or improper, but in any event the existence of the admittedly valid notice preserves all rights and the contemporaneous granting of limited permission to use the work, whether valid or not, has no effect on the validity of the underlying and fully preserved right.

A question is raised as to fair use of these later addresses in compilations or in quotation or criticism. This is a suit for declaratory judgment, and appellant has not presented a copy of the book or pamphlet it intends to publish. Nor has it otherwise unambiguously indicated just what use it plans to make of these later speeches. Without the planned use before the court, it is, of course, impossible to determine whether it is fair. Appellant's prayer for relief below indicates, however, that it wants to be able to use these speeches "either in full or in part, in book form or otherwise." Insofar as that prayer asks for a declaration that the doctrine of fair use will justify publication as a book of verbatim copies of some of these speeches, the matter is put with sufficient definiteness to permit an answer. The publication of a work consisting in substantial part of quotations from another copyrighted work is not permitted under the theory of fair use.[34] If less than the whole text of the speeches is taken, the competitive effect of such a publication by the appellant on the similar work published in compliance with the Admiral's copyright would be a relevant factor.[35] The question as to the fair use of the addresses copyrighted

[34] See Folsom v. Marsh, 9 Fed. Cas. No. 4901, p. 342 (C.D. Mass. 1841); Toksvig v. Bruce Pub. Co., 181 F. 2d 664 (7th Cir. 1950); Yankwich, What is Fair Use?, 22 U. Chi. L. Rev. 203 (1954).

[35] See 56 Col. L. Rev. 585, 593, 597 (1956).

after December 1, 1958, is left to the District Court on remand.

The record shows that there are some of the addresses to which our holding may not be applicable. Copies of No. 23, Education—Our First Line of Defense, bore a copyright notice that is sufficient to protect it from use by others under § 10 of the Act. Nos. 7, Nuclear Power—Challenge to Industry, and 12, Christopher Columbus, are said not to have been distributed to the public as the others were.

In these circumstances, we conclude it is better to reverse and remand to the District Court for further hearing and application of this opinion.

It is so ordered.

WASHINGTON, *Circuit Judge, dissenting:* I would affirm the judgment of the District Court. I do not believe that the dissemination of the 22 speeches delivered prior to December 1, 1958, was such as would defeat the author's common law right of first public tion. They were therefore not in the public domain when Admiral Rickover filed his application for registration of the speeches in compiled form under Section 12 of the Copyright Act, 17 U.S.C. § 12 (1958). Consequently, nothing in Section 8 of the Art could bar the validity of the copyright thus secured, both as to the compilation and as to the individual speeches contained in it.

It is clear that Admiral Rickover intended to foster the widest public dissemination of his words—as current news—for the sake of advancing his own views and programs. But I think that it is equally clear that he meant to preserve, and actually did preserve, the exclusive right to publish the speeches in compiled form after their immediate news value had passed away. Speeches of men in the forefront of public life are unique among literary products. Not only are they often works of considerable literary merit, but they may also be "news" of the first importance. As "news" they deserve the widest unfettered contemporaneous dissemination. Where, as here, an author seeks to advance this end by making copies of his speeches available to the press and other interested persons,

he is serving the public's interest as well as his own. But insofar as they have a commercial value as literary works after their immediate news importance has passed, they belong appropriately to their creator. The public interest in the news value of the author's work may cut across or postpone his rights; but that is not to say that it extinguishes them.[1]

In my judgment the rule which requires a publication to be "limited" to avoid forfeiture of property rights in the material published is wholly inapposite here.[2] There can be no limited publication of "news"; "news" as such is everyone's property. Compare *Chicago Record-Herald Co. v. Tribune Association*, 275 Fed. 797, 798 (7th Cir. 1921). But what remains, after the news value of the words has passed, should belong exclusively to the author, or his assignees. The people who will buy a compilation of Admiral Rickover's speeches, months and even years after they have been reported in the press, will do

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[1] *Cf.* Atlantic Monthly Co. v. Post Publishing Co., 27 F. 2d 556 (D. Mass. 1928), dealing with a copyrighted magazine article which was also "political 'news' of the most important character," *id.* at 557. Such a copyright, in my view, should be no bar to bona fide contemporaneous quotation by the press, whether or not express permission to copy is given.

[2] This test is characteristically invoked where there has been a prepublication circulation of a literary or musical work for promotion purposes, *e.g.*, Hirshon v. United Artists Corp., 100 U.S. App. D.C. 217, 243 F. 2d 640 (1957); Ilyin v. Avon Publications, Inc., 144 F. Supp. 368 (S.D.N.Y. 1956). It is sometimes said that dissemination must be limited to some ascertained group or class, White v. Kimmell, 193 F. 2d 744 (9th Cir. 1952), but even this requirement has been subject to qualification. See Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904). It is evident from these cases, and others treating the same questions, that the notion of "limit" rests upon the assumption that it is within the power of the author to prevent any circulation of his work. When he permits some dissemination, it becomes pertinent to inquire into his motives, to examine the extent of the distribution, and to consider the character of the recipients. Dissemination which is deemed too widespread is punished by forfeiture. Such inquiries, in my view, are quite irrelevant in the case of a leading public official, whose pronouncements on public matters should have—and are intended to have—wide dissemination as news.

so because they prize the fruits of the author's intellectual and literary efforts. There is nothing in the law which would compel this court to deprive the creator of the right to reap financial benefits from these efforts because, at the time of their creation, they had the added virtue of being newsworthy events of immediate public concern. Nor is there anything in the law which compels us to attach such a consequence to acts taken by an author to communicate to members of the public that element in his works which is properly theirs. It is a very grave matter for a court to pronounce the forfeiture of an author's intellectual property. I cannot conclude that such a result is warranted here.

The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No 15,463

Civil 116-59

PUBLIC AFFAIRS ASSOCIATES, INC.,
t/a PUBLIC AFFAIRS PRESS, *Appellant*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Appellee*

Appeal from the United States District Court for the District of Columbia.

Before: Mr. Justice Reed, retired, and Washington and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further hearing and application of the opinion of this Court.

It is further ordered by the Court that appellant herein recover from appellee its taxable costs on this appeal, and have execution therefor.

Per Mr. Justice Reed.

Dated: October 20, 1960

Separate dissenting opinion by Circuit Judge Washington.

Appendix C

PRESS RELEASE SAMPLES

FOR RELEASE AT 11:00 A.M. (PST)
THURSDAY, OCTOBER 27, 1955

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U. S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
For Delivery at Luncheon Sponsored by
The San Francisco Council of the Navy League,
The Chamber of Commerce, and
The Commercial Club
Merchants Exchange Building
San Francisco, California
October 27, 1955

NUCLEAR POWER AND THE NAVY

I appreciate this opportunity to talk to you on Theodore Roosevelt's birthday because he, more than any other man, helped to mold our Navy into a highly mechanized and effective instrument of national policy. In particular, he encouraged the Navy to convert from coal to oil. Although the use of oil as a fuel for our warships had been under consideration since 1866, it was not until his administration, and with his encouragement and support, that the final decision to change was made - a change almost as significant as the one from sail to coal.

Today our Navy is embarked on an even grater change - from oil to nuclear power. I don't believe this will take as long as it took to convert from sail to steam or from coal to oil. Unlike the earlier changes in which merchant shipping took the lead, the change to nuclear power began with a naval vessel.

AEC

UNITED STATES
ATOMIC ENERGY COMMISSION
Washington 25, D. C.

Tel. ST 3-8000
Ext. 307

FOR RELEASE AT 9:00 P.M. (EDT)
TUESDAY, MAY 14, 1957

Remarks Prepared by RADM H. G. Rickover, USN
Chief, Naval Reactors Branch
Division of Reactor Development
U. S. Atomic Energy Commission
and
Assistant Chief of the Bureau of Ships
for Nuclear Propulsion
Navy Department
For Delivery at Banquet of the
Annual Scientific Assembly of the
Minnesota State Medical Association
St. Paul, Minnesota
May 14, 1957

ENERGY RESOURCES AND OUR FUTURE

I am honored to be here tonight, though it is no easy thing, I assure you, for a layman to face up to an audience of physicians. A single one of you, sitting behind his desk, can be quite formidable.

My speech has no medical connotations. This may be a relief to you after the solid professional fare you have been absorbing. I should like to discuss a matter which will, I hope, be of interest to you as responsible citizens: the significance of energy resources in the shaping of our future.

Appendix D — LIST OF RESPONDENT'S SPEECHES
Issued As Official Press Releases

Metallurgy In Atomic Power *(Atomic Energy Commission)*	October 20, 1955
Nuclear Power and the Navy *(Defense Department)*	October 27, 1955
Engineering and Scientific Education *(Atomic Energy Commission)*	November 22, 1955
Lead Time and Military Strength *(Defense Department)*	January 12, 1956
Nuclear Power and the Navy *(Defense Department)*	August 16, 1956
The Education of Our Talented Children *(Atomic Energy Commission)*	November 20, 1956
Nuclear Power—Challenge to Industry *(Defense Department)*	January, 1957
The Challenge of Nuclear Power *(Defense Department)*	March 1, 1957
The Talented Mind *(Defense Department)*	March 11, 1957
Energy Resources and Our Future *(Atomic Energy Commission)*	May 14, 1957
The Naval Revolution *(Defense Department)*	September 14, 1957
Acceptance of International Communication Award *(Defense Department, announcement)*	October 12, 1957
The Balance Sheet on Education *(Atomic Energy Commission)*	November 22, 1957
Revolution at Sea *(Defense Department)*	December 5, 1957
Education in the Nuclear Age *(Atomic Energy Commission)*	December 6, 1957
European and American Secondary Schools *(Atomic Energy Commission)*	March 23, 1958
The Truth Shall Make You Free *(Atomic Energy Commission)*	April 19, 1958
The Meaning of Your Profession *(Atomic Energy Commission)*	June 14, 1958
Investment in Human Resources *(Atomic Energy Commission)*	September 25, 1958
The Meaning of the Nautilus' Polar Voyage *(Atomic Energy Commission)*	September 29, 1958

APPENDIX D — CONTINUED

A Common Heritage *(Atomic Energy Commission)*	October 23, 1958
Theodore Roosevelt—Modern American *(Atomic Energy Commission)*	October 27, 1958
Education: Our First Line of National Defense *(Press release of speech at Harvard Club of New York)*	December 11, 1958
Democracy and Competence *(Press release of speech at North Carolina State College)*	February 17, 1959
Illusions Cost Too Much *(Press release of speech before Yale Club of Washington, D.C.)*	March 16, 1959
The Shippingport Atomic Power Station: Lessons From Its Operation *(Press release of speech before American Public Power Ass'n.)*	May 28, 1959

(Note: The last four speeches were issued by Admiral Rickover.)

Appendix E
U. S. ARMY COPYRIGHTING PRACTICE

UNITED STATES ARMY IN WORLD WAR II

The War in the Pacific

VICTORY IN PAPUA

by

Samuel Milner

OFFICE OF THE CHIEF OF MILITARY HISTORY
DEPARTMENT OF THE ARMY
WASHINGTON, D. C., 1957

Title page of one of the official military histories printed by the Government Printing Office under copyright of Army officers.

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Library of Congress Catalog Card Number: 56-60004

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C.

This copyright notice appears in "Victory in Papua". R. W. Stephens was Assistant Chief of the Office of Military History.

Appendix F

OFFICIAL MILITARY HISTORIES COPYRIGHTED BY ARMY OFFICERS

All of these books were printed by the Government Printing Office and are available from the Superintendent of Documents. The official seal of the United States is imprinted on the cover of each. The copyright claimants had the rank of General and were Chief of the Office of Military History at about the period of copyright registration. However, the official status of the copyright claimants is not indicated in the copyright notices.

The Organization and Role of the Army Service Forces, by Joseph D. Millett. (1954, 494 pp., $4.25). Copyrighted by Albert C. Smith.

The Fall of the Philippines, by Louis Morton. (1953, 626 pp., $5.25). Copyrighted by Orlando Ward.

Victory in Papua, by Samuel Milner. (1957, 409 pp., $6.00). Copyrighted by R. W. Stephens.

Seizure of the Gilberts and Marshalls, by Philip A. Crowl and Edmund G. Love. (1955, 414 pp., $5.75). Copyrighted by Albert C. Smith.

The Approach to the Philippines, by Robert Ross Smith. (1953, 623 pp., $6.25). Copyrighted by Orlando Ward.

Northwest Africa: Seizing the Initiative in the West, by George F. Howe. (1957, 748 pp., $7.75). Copyrighted by Richard W. Stephens.

The Lorraine Campaign, by H. M. Cole. (1950, 657 pp., $11.00). Copyrighted by Orlando Ward.

The Supreme Command, by Forrest C. Pogue. (1954, 607 pp., $6.50). Copyrighted by Albert C. Smith.

Logistical Support of the Armies, Vol. I (May 1941-September 1944) by Roland G. Ruppenthal. (1953, 616 pp., $4.50). Copyrighted by Orlando Ward.

Logistical Support of the Armies, Vol. II (September 1944-May 1945) by Roland G. Ruppenthal. (1959, 540, 540 pp., $4.50). Copyrighted by R. W. Stephens.

Time Runs Out in CBI, by Charles F. Romanus and Riley Sunderland. (1959, 428 pp.) Copyrighted by Richard W. Stephens.

Rearming the French, by Marcel Vigneras. (1957, 444 pp., $4.25). Copyrighted by John H. Stokes.

Chief of Staff: Prewar Plans and Preparations, by Mark Skinner Watson. (1950, 551 pp., $4.25). Copyrighted by Orlando Ward.

Washington Command Post: The Operations Division, by Ray S. Cline. (1951, 413 pp., $3.75). Copyrighted by Orlando Ward.

Strategic Planning for Coalition Warfare, by Maurice Matloff and Edwin M. Snell. (1953, 454 pp., $3.75). Copyrighted by Orlando Ward.

Global Logistics and Strategy, by Richard M. Leighton and Robert W. Coakley. (1955, 730 pp., $6.25). Copyrighted by Albert C. Smith.

The Army and Economic Mobilization, by R. Elberton Smith. (1958, 749 pp., $5.25). Copyrighted by Richard W. Stephens.

Guadalcanal: The First Offensive, by John Miller, Jr. (1949, 113 pp., $1.00). Copyrighted by Orlando Ward.

Cross-Channel Attack, by Gordon A. Harrison. (1951, 519 pp., $6.75). Copyrighted by Orlando Ward.

The Persian Corridor and Aid to Russia, by T. H. Vail Motter. (1952, 545 pp., $4.00). Copyrighted by Orlando Ward.

Stilwell's Mission to China, by Charles F. Romanus and Riley Sunderland. (1953, 441 pp., $5.50). Copyrighted by Orlando Ward.

Stilwell's Command Problems, by Charles F. Romanus and Riley Sunderland. (1956, 518 pp., $6.25). Copyrighted by Albert C. Smith.

The Signal Corps, by Dulany Terrett. (1956, 383 pp., $3.50). Copyrighted by Albert C. Smith.

The Transportation Corps: Responsibilities Organization, and Operations, by Chester Wardlow. (1951, 454 pp., $3.75). Copyrighted by Orlando Ward.

Three Battles: Arnaville, Altuzzo, and Schmidt, by Charles B. MacDonald and Sidney T. Mathews. (1952, 443 pp., $4.50). Copyrighted by Orlando Ward.

The Women's Army Corps, by Mattie E. Treadwell. (1954, 841 pp., $6.25). Copyrighted by Orlando Ward.

The Quartermaster Corps: Organization, Supply, and Service, Vol. I, by Erna Risch. (1953, 418 pp., $3.75). Copyrighted by Orlando Ward.

Command Decisions, Kent Roberts Greenfield, editor. Listed as an official work in "Publications of the Office, Chief of Military History, Department of the Army". Copyrighted by Harcourt, Brace and Company in 1959. Mr. Greenfield was Chief Army Historian in 1959.

Appendix G

PUBLICATIONS OF U. S. NAVAL INSTITUTE

How to Survive on Land and Sea, by Office of Chief of Naval Operations, U.S. Navy. (Copyrighted 1943 and 1951 by the U.S. Naval Institute, 366 pp., $4.00).

Air Operations in Naval Warfare, edited by Commander Walter C. Blattmann, USN. (1957, 192 pp., $2.00).

The Bluejacket's Manual, U.S. Navy, by Captain J. V. Noel, Jr., USN. (Fifteenth edition, 1957; reprinted 1959, 643 pp., $1.95).

The Coast Guardsman's Manual, by Captain W. C. Hogan, USCG. (Revised by Lieutenant Commander M. M. Dickinson, USCG, assisted by Loran W. Behrens, BMC, USN-FR.) (Third edition, 1958, 830 pp., $4.00).

Division Officer's Guide, by Captain J. V. Noel, Jr. (Fourth edition, 1959, 304 pp., $2.25).

Elementary Seamanship, prepared by Lieutenant Commander Maurice C. Hartle, USN, Lieutenant Charles M. Lake, USN, Lieutenant Harry P. Maders, USN, and J. J. Metzger, BMC, USN. (1958, 92 pp., $2.00).

Elements of Applied Thermodynamics, by Captain W. A. Brockett, USN and R. M. Johnston, and A. E. Bock. (Third revised edition, 1953, 196 pp., $5.00).

Fundamentals of Construction and Stability of Naval Ships, by Thomas C. Gilmer, U.S. Naval Academy. (Second edition, 1959, 370 pp., $5.50).

International Law for Naval Officers, by Commander C. C. Soule, USN and Lieutenant Commander C. McCauley, USN. (Revised by Lieutenant Commander C. J. Bright, USN, 245 pp., $2.00).

International Law for Seagoing Officers, by Commander Burdick H. Brittin, USN. (1956, 256 pp., $4.50).

Logarithmic and Trigonometric Tables, by the Department of Mathematics, U.S. Naval Academy. (Reprinted 1959, 93 pp., $1.65).

Military Law, compiled by Captain J. K. Taussig, Jr., USN and Commander H. B. Sweitzer, USN. (Revised by Commander M. E. Wolfe, USN, and Lieutenant Commander R. I. Culick, USN, Reprinted 1959, 90 pp., $2.00).

Naval Leadership, prepared at the U.S. Naval Academy for instruction of midshipmen. (1949, 324 pp., $3.00).

Naval Shiphandling, by Commander R. S. Crenshaw, Jr., USN, aided by officers of the Navy, Coast Guard, Merchant Marine and Pilot Service. (1955, 396 pp., $4.50).

Appendix H
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VII. SERVICES AROUND THE WORLD

(Reproduction of authorized announcement.)

Appendix I

COPYRIGHTING PRACTICE IN ATOMIC ENERGY

Atomic Energy for Military Purposes

The Official Report
on the Development of the Atomic Bomb
under the Auspices
of the United States Government,
1940–1945

By HENRY DeWOLF SMYTH
CHAIRMAN, DEPARTMENT OF PHYSICS
PRINCETON UNIVERSITY
CONSULTANT, MANHATTAN DISTRICT, U.S. ENGINEERS

Written at the request of
MAJ. GEN. L. R. GROVES, U.S.A.

PRINCETON
PRINCETON UNIVERSITY PRESS
1946

Appendix J

ATOMIC ENERGY COMMISSION'S COPYRIGHTING PRACTICES

PRINCIPLES OF NUCLEAR REACTOR ENGINEERING

RADIATION PROTECTION

► Radiation Hazards and Health Physics: Biological Effects of Radiation; Radiation Dose Units; Standards of Biological Protection; Protection of Personnel; Radioactive Waste Disposal; Problems.

SHIELDING OF NUCLEAR REACTOR SYSTEMS

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► Introduction.

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Appendix K

CONGRESSIONAL COPYRIGHTING PRACTICES

85th Congress
2d Session

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 955

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted]

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hyman G. Rickover, Respondent, respectfully requests that if the Petition for a writ of certiorari filed herein on January 14, 1961, by Public Affairs Associates, Inc. be granted, the order entered to that effect provide for a review of that part of the judgment of the United States Court of Appeals for the District of Columbia Circuit which held that Respondent's speeches prior to December 1, 1958, not individually copyrighted, were dedicated to the public domain by Respondent's acts of distribution. If the said Petition be denied, as Respondent believes it should be, Respondent respectfully requests that this Cross-petition be deemed withdrawn.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 284 F.2d 262 and is set forth as Appendix A to the Petition (p. 30-47).

The opinion of the United States District Court for the District of Columbia is reported at 177 F. Supp. 601 and is set forth in the Brief for Appellant and Appendix Below (p. 54).

The judgment of the court below as filed October 20, 1960, and as set forth as Appendix B to the Petition (p. 48), was modified by an order of the United States Court of Appeals for the District of Columbia Circuit dated January 17, 1961, to provide that each party bear its own costs. A copy of that order, as filed January 17, 1961, is set forth herein as Appendix 1 (p. 17, *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of Respondent the question presented by the Petition is:

Whether the Respondent, a Vice Admiral of the United States Navy, is entitled to own certain literary material—speeches prepared for oral delivery—written and delivered orally by him otherwise than as part of his regular duties and not pursuant to official assignment of any kind.

QUESTION PRESENTED BY THIS CONDITIONAL CROSS-PETITION

Whether the Respondent lost his rights in some of the speeches by certain acts of distribution,—performance and distribution to reporters and a limited group of individuals,—at the time of oral delivery, of copies which he had caused to be made, through the use of government facilities, in the form of press releases bearing no notice of copyright.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U. S. Constitution, Article I, Section 8, clause 8.

The Congress shall have Power * * *;

* * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * *

2. The Copyright Law, 17 U.S.C.

§ 1. Exclusive rights as to copyrighted works—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * *

§ 2. Rights of author or proprietor of unpublished work—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

§ 4. All writings of author included—The works for which copyright may be secured under this title shall include all the writings of an author.

§ 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material—No copyright shall subsist in the original text of any work which is in the public domain, * * * or in any publication of the United States Government, or any reprint, in whole or in part, thereof: * * *

§ 10. Publication of work with notice—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; * * *

§ 12. Works not reproduced for sale—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; * * *. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

3. The Printing Law, 44 U.S.C.

§ 58. Sale of duplicate plates; copyright.—* * * No publication reprinted from such stereotype or electrotype plates [from which any Government publication is printed] and no other Government publication shall be copyrighted.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case sets forth, as facts, conclusions which were flatly rejected by the Trial Court and by the Circuit Court. The relevant facts are as follows:

1. Petitioner is a book publisher.

2. Respondent is a Vice Admiral of the United States Navy on active duty as Assistant Chief of the Bureau of Ships for Nuclear Propulsion, and is Assistant Director for Naval Reactors, Division of Reactor Development, U. S. Atomic Energy Commission.

3. Since October 20, 1955, Respondent has occasionally delivered speeches on matters of public interest. Respondent's speeches were written and deliverd by him of his own volition and not as part of his official duties (177 F. Supp. 601, 604; 284 F.2d 262, 269).

4. Prior to January 16, 1959, the date of commencement of this action, Respondent delivered twenty-three speeches.

(a) None of the first twenty-two was copyrighted at the time it was distributed by Respondent in written form.

(b) The twenty-third speech, that prepared for delivery on December 11, 1958, bore a notice of copyright and was deposited in the Copyright Office on December 1, 1958, with an application for registration.

5. Since January 16, 1959, each speech made by Respondent, with one exception, has been individually copyrighted.

6. The speeches were not official publications (284 F.2d at 269, 177 F.Supp. at 604).

7. The speeches were all written by Respondent in longhand on such of his time as is his own. None of them was written at the office. A large part of the speeches was typed by Respondent's wife at home. The typewritten material plus some handwritten portions were brought in to the Respondent's office for the typing of a final copy and the preparation of a multilith master by the Respondent's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on government duplicating machines.

8. The speeches were distributed in limited number to the press and to individuals who had requested copies or who Respondent believed would be interested in the subject.

9. Respondent's speeches as prepared for distribution bore his name, his rank in the United States Navy and his title in the Atomic Energy Commission. The speeches as distributed customarily bore a statement "for release", giving the date and frequently the time of the release, and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission.

10. Respondent is required to do a substantial amount of traveling and did not take leave of any kind in connection with the trips during the course of which he made the speeches. He was able to conduct government business at or near the location in which a speech was to be given, and arrangements were made to make the speeches in free or "off duty" hours. The transportation in every instance was provided by the government.

11. Each of Respondent's speeches was submitted to the Department of Defense, Office of Security Review, in advance of its release. No objection thereto was received, and each of them was returned to Admiral Rickover bearing the stamp of the Office of Security Review, reading as follows:

"NO OBJECTION TO PUBLICATION ON GROUNDS OF MILITARY SECURITY.

(Here date was stamped)

OFFICE OF SECURITY REVIEW (OASD L & PA) DEPARTMENT OF DEFENSE."

12. On or about October 29, 1958 Petitioner advised Respondent that it desired to publish Respondent's speeches in book form and Respondent indicated he would not grant Petitioner's request for permission to publish them.

REASONS FOR DENYING THE WRIT

I. The Petition presents questions of fact rather than law.

This case has been decided, as it should have been, on its own particular facts.

The facts were determined by the District Court to support Respondent with respect to the basic question presented—that of ownership of the speeches on their creation—and the Court of Appeals found unanimously in favor of Respondent on this question.

Specifically, the District Court found that Respondent's speeches are in the group of "literary products of a Government officer or employee that have some bearing on, or that arise out of his official actions, although writing the book or delivering the address in question, is no part of his official duties." (177 F. Supp. at 604).

The Court of Appeals unanimously reached the same conclusion and set forth the findings of fact as follows (284 F.2d at 265-266):

> "The agreed statement of facts shows that the writing of these speeches was done at home after normal working hours or while traveling. It was agreed:
>
> 'The speeches were written by the Admiral in longhand. A large part of the speeches were typed by Mrs. Rickover at home. The typewritten material plus some handwritten portions were brought in to the Admiral's office for the typing of a final copy and the preparation of a multilith master by the Admiral's secretary. In some cases the master was prepared directly from the typewritten copy as brought in from home. All of the speeches were multilithed on Government duplicating machines.
>
> * * *
>
> 'The defendant admits that it was his practice to have his speeches as prepared for distribution bear his name, his rank in the United States Navy and his title in the Atomic Energy Commission, that the speeches as distributed customarily bore a statement 'for release' giving the date and frequently the time of the release and with few exceptions were on the paper stock used for press releases by the Department of Defense or the Atomic Energy Commission.'
>
> After multilithing and at or before delivery, all speeches except Nos. 7 and 12 in footnote 3, supra, were distributed. The statement of agreed facts shows as follows:
>
> 'Certain of the speeches, approximately sixteen in number, were also made available to the press through the Public Information Office of

the Department of Defense or of the Atomic Energy Commission, or both. In distributing the speeches, Admiral Rickover mailed some to individuals who had requested copies or who[m] Admiral Rickover believed would be interested in the subject. Some were sent by Admiral Rickover, approximately 50 in each case, to the sponsor of the speech to be made available to the press and others at the place where the speech was to be delivered. Some speeches were sent to the Press Club in Washington by Admiral Rickover for the use of representatives of the press.'

"Each speech was cleared by the Department of Defense, Office of Security Review. This was done under § 1252 of the General Regulations of the Navy which, inter alia, provide:

'3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department.'

There was also a Department of Defense Directive in effect during the time the speeches were delivered.[4]

---

[4] "V. *Writing for Publication by Defense Personnel as Individuals.* Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or

"Admiral Rickover had duties of supervision and inspection that could be carried out at or near the various points of delivery, and arrangements were made to make the speeches in free or 'off duty' hours. No transportation costs were paid by Admiral Rickover in connection with his addresses. Honoraria, when offered, were paid directly to charities specified by the Admiral.

"The District Court in its opinion determined that the addresses listed in note 3 fell into a class of literary productions 'that arise out of [the author's] official actions, although writing the book or delivering the address in question, is no part of his official duties.' * * *"

This Court should not be called upon to examine the facts in this case still another time. The finding of all four judges who did examine them should be accepted as determinative of the matter and the Petition should, therefore, be denied. *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630 (1946); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944).

II. There is no conflict among Courts of Appeals on the law applicable to the facts concerning the basic question.

On the question of ownership of literary material written by government officials, there is no conflict among Courts of Appeals. The decision in this case is thoroughly in accord with *Sherrill* v. *Grieves*, 57 The

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conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD (PA), for review and clearance to avoid any possible violation of military security." DOD Directive No. 52,369, Aug. 17, 1957.

Washington Law Reporter 286 (1929), and *First Trust Co. of St. Paul* v. *Minnesota Historical Society*, 146 F. Supp. 652 (1956), *aff'd*, 251 F.2d 686 (1958). All three of them reach the same result on similar ultimate facts.

On the other hand, *Sawyer* v. *Crowell Publishing Company*, 46 F. Supp. 471 (1942), *aff'd*, 142 F.2d 497 (1944), *cert. denied*, 323 U.S. 735 (1944), which found against the private right of copyright ownership claimed by an official of the Department of Interior, was amply justified by the substantially different fact situation there involved. Sawyer appropriated to his own use an extensive amount of government material and scientific information and ordered many weeks of work done on the preparation of a new map under his direction by subordinates of his in government service. The finished map was printed and engraved by the United States Geological Survey, a division of the Department of Interior and bore the legend "Data obtained from official sources, computations on this map verified by the General Land Office." A clear distinction exists between the essential facts in the Sawyer Case on the one hand and those in the Sherrill Case, *supra*, the Lewis and Clark Case (*First Trust Co. of St. Paul* v. *Minnesota Historical Society*, *supra*) and the present case on the other, and a contrary result was called for and does not indicate the existence of a "conflict" between Circuits.

III. There is no conflict with applicable decisions of this Court.

The decision below on the main question is in accord with decisions of this Court in the field of copyright.

This Court has held that while judicial opinions themselves could not be copyrighted the marginal

notes or head notes of the cases and points decided, the abstract of the records and evidence and the index, represented the individual work of the court reporter in which he was entitled to copyright protection. *Callaghan* v. *Myers*, 128 U.S. 617 (1888); *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591 (1834).

In the field of patents this Court has held in *U.S.* v. *Dubilier Condenser Corporation*, 289 U.S. 178 (1933), *corrected*, 289 U.S. 706 (1933), that two employees of the Bureau of Standards were entitled to patent inventions made by them while employed in the Radio Section of the Bureau notwithstanding their extensive use of government facilities.

Decisions of this Court in the field of torts are not controlling in this situation. The cases cited in the Petition (pp. 8-11) involve officials seeking immunity, claiming that their conduct should be deemed that of the government. This is a substantially different type of question turning on the theory of actual or implied agency with respect to defamatory utterances made by government officials acting within certain areas as a matter of discretion rather than pursuant to orders. It has no application to an official's freedom to create "Writings and Discoveries" on his own time, of his own volition and not pursuant to orders.

IV. This case does not involve any important question of unsettled federal law.

The Petition is predicated solely on the hypothesis that Respondent's actions were official actions. But this question of fact has been decided against Petitioner. Whatever the alleged ambiguity of the term "government publication" (Petition, pp. 16-17) when considered in other contexts, the factual basis for such an issue is not present here.

That the terms "Government publication" in the Printing Law, 44 U.S.C. § 58, and "publication of the United States Government" in the Copyright Law, 17 U.S.C. § 8, are not accompanied by definition facilitating their application to individual situations, would not be cured by further arguing this case. The Copyright Office Study No. 21-C, Copyright in Government Publications, is directed toward possible general revision of the statute. If clarification of the term "Government publication" be needed, and this is not conceded, Congressional action would be required. It would be no answer to the general and sweeping questions sought to be raised by the Petition as to all types of Government publications if this Court were to overrule the District Court and the Court of Appeals on the facts which both found—namely, that the speeches of Respondent were not official publications.

In objecting to the decision below on the ground that, due to the alleged complexity and confidential nature of personnel records, it will not provide an answer to all similar questions which may arise and that it will not defeat alleged attempts to evade the Printing Law and the Copyright Law, Petitioner applies to the wrong forum for relief.

V. This case presents no question of freedom of the press.

Respondent's rights in his speeches are sanctioned by and derived from Title 17, United States Code, which prescribes the conditions on which an author may enjoy exclusive rights in his writings. The authority for the statute is in the United States Constitution, Article I, Section 8, clause 8 and its constitutionality is clear. *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591 (1834).

An attempt to hide behind the First Amendment disregards the well established principles of the law of copyright which in fact permit the press to be free. The protection of the press lies in the doctrine of "fair use".

Respondent has repeatedly authorized and invited the press to use all or any part of his speeches. However, even if he had not done so the press would be able, under the doctrine of fair use to quote extensively from the speeches. Addresses made by a public official are news and as news can be reported as fully as desired.

The free press is protected by "fair use", but "fair use" does not protect the free rider.

As Judge Washington of the Court of Appeals said in his dissent below,

> "The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail." (284 F.2d at 273).

REASONS FOR GRANTING THE CROSS-PETITION

The Court of Appeals upheld Respondent as to his right to write, deliver and own his speeches and also as to the formalities observed by Respondent in copyrighting those speeches which he did copyright. However, the Court of Appeals, with one Judge dissenting, reversed the District Court as to the status of the speeches prior to December 1, 1958 not individually copyrighted and held that they had been dedicated to

the public domain by Respondent's "acts of distribution".

The majority considered the "acts of distribution" to be "* * * performance, distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches— * * *" (284 F.2d at 271).

In the first place "performance" of a work, or the delivery of a speech, does not operate to dedicate the work under a generally accepted principle of copyright law. *Ferris* v. *Frohman*, 223 U.S. 424 (1912); *Nutt* v. *National Institute, Incorporated*, 31 F.2d 236 (2d Cir. 1929). The introduction of "performance" into the criteria with respect to dedication beclouds the picture.

In the second place the distribution of approximately fifty copies of each speech, clearly identified as press releases, as a matter of law ought not be considered to have been a dedication to the public domain.

The Court of Appeals in this case (284 F.2d at 271) followed the Ninth Circuit Court of Appeals in *White* v. *Kimmell*, 193 F.2d 744 (1952), which is widely at variance with the more recent District of Columbia Circuit decision, *Hirshon* v. *United Artists Corp.*, 100 U.S. App. D.C. 217, 243 F.2d 640 (1957).

White v. *Kimmell* held that a distribution of copies wider in point of numbers than Respondent's and carried out over a long period of time indicated an intention to abandon the rights of the author.

The Hirshon Case, *supra*, in the District of Columbia Circuit held that a much wider distribution of copies did not dedicate.

In the Second Circuit, the United States District Court for the Southern District of New York has held, in *Ilyin* v. *Avon Publications, Inc.*, 144 F. Supp. 368 (1956), that a wide distribution of copies was not controlling in view of the surrounding circumstances.

A rationalization and clarification of the law in this area by this Court would be desirable. It is believed that such a review would lead to a reversal on the question of dedication in this case.

CONCLUSION

For the reasons stated the Petition for a writ of certiorari should be denied but if it be granted this Cross-petition should be granted. If the Petition for a writ of certiorari be denied, Respondent requests that this Cross-petition be deemed withdrawn.

Respectfully submitted,

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February 17, 1961

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,463

District Court Civil Action No. 116-59

PUBLIC AFFAIRS ASSOCIATES, INC., Appellant,

v.

VICE ADMIRAL HYMAN G. RICKOVER, Appellee.

Before: Mr. Justice Reed, sitting by designation, and Washington and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's motion to recall and modify the judgment entered herein October 20, 1960, and of appellant's opposition thereto, it is

ORDERED by the court that the judgment of October 20, 1960, shall be recalled from the District Court and amended by substituting in place of the last paragraph of the order the following:

"It is FURTHER ORDERED by the court that each party shall bear its own costs on this appeal."

It is FURTHER ORDERED by the court that the judgment, as modified, shall be forthwith transmitted to the District Court.

Per Curiam

Dated: January 17, 1961.

SUPREME COURT, U. S.

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MAR 8 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~739~~ 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Respondent*

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE FOR RESPONDENT PUBLIC AFFAIRS ASSOCIATES, INC.

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VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Respondent*

Response of Respondent to Conditional Cross-Petition for Writ of Certiorari

Public Affairs Associates Inc., Trading as Public Affairs Press, respectfully submit this Response to the Conditional Cross-Petition for a Writ of Certiorari in No. 739.

The Conditional Cross-Petition in No. 739 also includes material (pages 7-14) which is tantamount of an Opposition to the Petition for a Writ of Certiorari filed by Public Affairs Associates in No. 649. Consequently, this Response will include

(1) a Memorandum on the Conditional Cross-Petition in No. 739, and

(2) a Reply to the Cross-Petitioner's Opposition to the Petition in No. 649.

MEMORANDUM ON CONDITIONAL CROSS-PETITION (IN NO. 739)

Cross-Petitioner in No. 739 requests a conditional writ of certiorari on the issue of dedication — *i.e.*, whether dissemination of his speeches in official press release form prior to attempted copyright registration placed them in the public domain.

The nature and manner of such release have important relationship to the scope of the Cross-Petitioner's official duties, and to the Constitutional guarantee of Freedom of Press — two major issues raised by the Petition in No. 649. In this context the growing tendency of top-level Government officials to "government-by-press-release"[1] makes the Conditional Cross-Petition in No. 739 meritorious of this Court's consideration, especially because of a third issue raised in No. 649: the need for this Court to deal with the unsettled but important questions of construction of the Copyright Act and the Printing Law, in particular, clarification of the meaning of "Government publication."

Public Affairs Associates, Inc., therefore, raise no objection to the granting of the Conditional Cross-Petition in No. 739 if the Petition in No. 649 be granted.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (IN NO. 649)

The Cross-Petitioner's opposition to the Petition in No. 649 makes various arguments which, it is respectfully submitted, present no valid reason for denial of the Petition in No. 649.

I. Petition in No. 649 presents questions of law.

In alleging that the Petition in No. 649 presents questions of

[1] *Cf.* Mr. Justice Frankfurter's comment from the Bench that "the public relations counsel is part of our American way of life." 29 U.S. L. WEEK 3136 (Dec. 19, 1960)

fact and not of law. Cross-Petitioner misconceives the entire point. Petitioner in No. 649 does not contest the facts as found by the courts below; Petitioner contests only the erroneous rule of law applied by those courts to the undisputed facts.

There is not a single disputed issue of fact in this case. Both the Trial Court, 177 F. Supp. at 602, and the Court of Appeals, 284 F. 2d at 264, decided the case upon an "agreed statement of facts" and undisputed documents in the record. What is in dispute is whether Government press releases containing speeches by a high-level federal officer on matters related to and connected with his official duties are "Government publications" and therefore not subject to copyright under the Copyright Act and the Printing Law, or whether they are private publications legally subject to copyright. This determination is a legal one. The legal consequences of undisputed facts raise questions of law,[2] ones which are traditionally subject to appellate review and in no degree intrusive upon the fact-finding functions of the lower courts.

This Court has said that it is a question of law whether the lower court "applied the proper standard to essentially undisputed facts"[3], that "the legal effect of evidence is a question of law"[4], and that its function is "to ascertain the meaning of the findings [of fact] in order to determine their legal significance."[5]

The Petition in No. 649 does not require this Court to review the facts since both parties accept the facts as found below. This Petition presents the Court with a variety of important questions of law, for example:

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[2] 1 WIGMORE ON EVIDENCE 2 (3d ed. 1940); see also Wisconsin Electric Co. v. Dumore Co., 282 U. S. 813 (1930).

[3] United States v. Parke, Davis Co., 362 U.S. 29, 44 (1960).

[4] Interstate Commerce Commission v. Louisville and N. R. Co., 227 U.S. 88, 92 (1913).

[5] United States v. John J. Felin & Co., 334 U.S. 624, 639 (1948).

(1) The *legal* scope of "official duty" and "official responsibility" of a Government official;

(2) The *legal* meaning of the statutory term "Government publication" as used in the Copyright Act and the Printing Law;

(3) The *legal* effect of Cross-Petitioner's status as a top-level government official; and

(4) The Constitutional issue of Freedom of Press under the First Amendment.

II. Conflict among Courts of Appeals.

All the other Courts of Appeals that have ruled on this precise copyright question have taken a different and conflicting view of the applicable rule of the law from that adopted by the Court below.[6] In *Sawyer* in the Second Circuit[7] and the Lewis and Clark case in the Eighth Circuit[8] both courts ruled that whether a Government employee's publication was within his official duties depended on the *relationship* between the subject matter of the publication and the responsibilities of his Government position. These two Courts of Appeals ruled that such *connection* between the publication's subject matter and the employee's official duties created a Government publication. The Court below, however, rejected any such doctrine of "relationship" or "connection," and instead adopted the conflicting legal doctrine that a "Government publication" comes into being only if it was the specific object of the employee's duties to produce it. In addition, *Sawyer* attached weight to the fact that Government facilities and time were used to produce the publication, whereas the Court below dismissed such criteria altogether. In short,

[6] See Gunnels, as quoted in *Petition* (in No. 649) at p. 6.

[7] 46 F. Supp. 471 (D.C.S.D.N.Y. 1942), *aff'd* 142 F.2d 497 (2d Cir. 1944), *cert. denied* 323 U.S. 735 (1944).

[8] First Trust Co. of St. Paul v. Minn. Historical Society, 146 F. Supp. 652,668 (D.C. Minn. 1956), *aff'd sub nom.* U.S. v. First Trust Co. of St. Paul, 251 F.2d 686,691 (8th Cir. 1958).

the Courts of Appeals for the Second and Eighth Circuits apply directly conflicting legal doctrines from that adopted below.

III. Conflict with applicable decisions of this Court.

Cross-Petitioner does not deny that the dispositive legal question here is whether his activities were in the course of his official duties as a top-level Government official. Nor does he deny that the applicable decisions of this Court cited in the Petition (pp. 8-11) deal precisely with the question of determining when the activities of an executive official of the Federal Government come within his "official duties."

To avoid the impact of these directly applicable decisions, Cross-Petitioner cites decisions of this Court dealing with reporting of judicial opinions. The two decisions cited are *Callaghan v. Myers*, 128 U.S. 617 (which was decided in 1888 and did not relate to a Federal officer at all), and *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (rendered in 1834).

The cases cited do not related to executive officials of top-level rank. Both cases pre-dated the controlling statutes here involved. The prohibition against copyrighting of "Government publications" originated in the Printing Law (44 U.S.C. 58) in *1895*, 28 Stat. 608, §52; the prohibition in the Copyright Act (17 U.S.C. 8) was enacted in *1909*, 35 Stat 1075, §7.

Consequently the decisions in these two cases have no effect on the current legal situation controlled by the statutes cited.

The Cross-Petitioner also cites a patent case, *U.S. v. Dubilier Condenser Corp.*[9] Although this case was heavily relied upon by the District Court and strongly urged upon the Court of Appeals in Cross-Petitioner's brief below, the Court of Appeals ignored the case altogether.

Dubilier is inapplicable to the present case for at least four reasons:

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[9] 289 U.S. 178 (1933). Mr. Justice Stone dissented, with Mr. Justice Cardozo and Chief Justice Hughes concurring therein.

1. Patent and copyright are basically different.

Dubilier involved a patent; the present case involves copyright. The Constitution "recognizes that the standards for patents and copyrights are basically different."[10] And the statutory standard of valid patentable inventions is considerably different from the definition of copyrightable subject matter.[11] Because "there is a wide distinction between a patent and a copyright," "the cases which relate to the one subject are not altogether controlling as to the other."[12]

2. Different statutory bases for Government officials.

In *Dubilier* this Court itself pointed out that its decision was based upon unique statutory provisions applicable only to patents, that Government officials had been specifically authorized to take out patents for their Government work under a statute going back to 1883, and that the statute gave to the United States a free shop-right to use such patents.[13] It has also been a well-recognized part of our law for the U. S. Government itself to hold patent rights on inventions devised by public servants and private parties engaged by government agencies. For example, the National Aeronautics and Space Act of 1958

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[10] Alfred Bell & Co. v. Catalda Fine Arts, 191 F. 2d 99, 100-02 (1951) (the various legal and practical differences are outlined at length).

[11] Buckle, *Property Rights in Creative Works — A Comparison of Copyright and Patent Laws*, 32 J. PAT. OFF. SOC. 414, 426-435 (1950); Finkelstein, *Public Performance Rights* . . . . 7 COPYRIGHT PROBLEMS ANALYSED (1951) 69-70. See also Hett, *The Patentee v. the Copyrightee*, ASCAP, COPYRIGHT LAW SYMPOSIUM, Fifth Series (1954), 191 (". . . the differences . . . are many.")

[12] STEDMAN, PATENTS 6-7 (1939); Recent Cases, *Copyright-Right of Government Officer* . . . 33 TEMP. L. Q. 365,369 (1960) ("Decisions in the patent cases would not necessarily be controlling in copyright cases")

[13] 289 U.S. 178, 189, 201, 192. The statute presently appears in 35 U.S.C. 26.

requires certain patents to be in the Government's name.[14] A similar provision prevails in the field of atomic energy.[15] By direction of Congress the Department of Agriculture includes in its contracts a requirement that the results of its research and investigations be made available to the public either by dedication, assignment to the Government, or such other means as the Secretary shall determine.[16] In still other agencies, the applicable statute authorizes Government agencies to take title to such patents in the public interest.[17]

In copyright, a completely different and contrary statutory pattern prevails. The Copyright Act, 17 U.S.C. 8, and the Printing Law, 44 U.S.C. 58, specifically prohibit both the Government itself as well as Government employees from taking copyright in any Government publications.[18] And, contrary to the situation with patents,[19] the Government has no shop-right in copyrighted materials.

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[14] Section 305, 72 Stat. 435 (1958), 42 U.S.C. 2457.

[15] Atomic Energy Act of 1946, as amended, 68 Stat. 944 (1954), 42 U.S.C. 2182 (1958).

[16] Research and Marketing Act of 1946, 7 U.S.C. 427i. The Department's consistent practice has been to require an assignment of patent rights to the government. Statement of Assistant Secretary of Agriculture, "Patent Policies of Departments and Agencies of the Federal Government-1959," *Hearings Before a Subcommittee of the Senate Select Committee on Small Business*, 86th Cong., 1st Sess., on "The Effect of Federal Monopoly Policies on Competition, Monopoly, Economic Growth, and Small Business," Dec. 8, 9, 10, 1959, p. 354 (hereinafter referred to as *Senate Hearings*).

[17] For Defense Department, see *Senate Hearings*, at p. 338 *et seq.*; 32 C.F.R., Part 9; for Department of Health, Education and Welfare, see *Senate Hearings*, at 361; 45 C.F.R. Part 6.

[18] The only exception is for the Postmaster General in connection with illustrations of stamps, 17 U.S.C. 8 (proviso in first paragraph).

[19] In patents, shop-rights most commonly arise not by express agreement but "by implication of the circumstances of the employment." Annot., *Application and effect of 'shop right rule' . . .* 61 A.L.R. 2d 356, 368 (1958).

3. Dubilier moot.

Executive Order No. 10096[20] has mooted *Dubilier*.[21] This Order establishes a uniform patent policy for government employees' inventions which gives to the U. S. Government (except as waived) "the entire right title and interest" in all inventions made by any government employee

> "(1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or (3) which bear a direct relation to or are made in consequence of the official duties of the inventor."

4. Cross-Petitioner comes without "clean hands."

Cross-Petitioner's reliance upon *Dubilier* is inconsistent with his public espousal of an exactly opposite position for other Government officials; he comes here without "clean hands." As recently as April 8, 1960, he told a Senate Committee that

> "Where the Government bears all or nearly all the cost, where the facilities belong to the Government, and where the Government bears all the risk, the people should own the patents. The American people are spending their money for the research and development; therefore, the patents should belong to them.[22] . . . The Government should own patents resulting from work it has financed.[23] . . . I believe that patents should

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[20] Jan. 23, 1950, 3 C.F.R. 292 (1949-1953 comp.)

[21] Cf: *Recent Cases, Copyright . . .*, 9 CATH.U.L.REV. 109, 105 (1960). Cross-Petitioner's Counsel substantially agreed with this view. Brief for Appellee Below, pp. 8-9.

[22] U.S. Senate, Select Committee on Small Business, Subcommittee on Monopoly, *Patent Policies of Government Departments and Agencies — 1960*, Committee Print, 86th Cong. 2nd Sess., April 8, 1960, p. 2 (hereinafter cited as *Conference*)

[23] *Id* at 6.

generally belong to the Government where Government money is used to develop them."[24]

In view of a justification urged by the Trial Court for its decision (*i.e.*, that private copyright is necessary "to encourage intellectual development" of government officials[25]), Cross-Petitioner's farther comments to the Senate Committee are illuminating:

"Nor do I agree with the statement frequently made that unless there is such a patent provision, their employees will not work assiduously. I have never seen anything of the sort. A man who has an idea in his mind, if he is worth his salt, will want to get it out. He will fight all obstacles to get it out."[26]

And again:

". . . AEC and NASA work. In these fields the law places ownership of patents initially in the U. S. Government. This gives the Government the opportunity to make them available to everyone. In my opinion, this is a good system, because it makes new information available quickly. Otherwise, there is the possibility of withholding information . . ."[27]

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[24] *Id* at 7.

[25] 177 F. Supp. at 604.

[26] *Conference*, at 4.

[27] *Id.* at 5. Cross-Petitioner is an AEC as well as Navy official. AEC's patent policy is this: "It is the Commission's view that where the Commission sponsors and pays for research and development . . . that the resultant inventions and discoveries should be the property of the Government for the benefit, not only of the particular contractor, but of the general public . . . Everyone is entitled to the use of the scientific and technical data and the inventions and discoveries that have resulted from Commission contracts," Statement of AEC's Assistant General Counsel for Patents, *Senate Hearings*, at pp. 234-35.

For the aforesaid reasons, it is respectfully submitted that *Dubilier* is not an "applicable" decision of this Court.[28]

IV. Unsettled questions of Federal law.

In claiming that the Petition in No. 649 involves no unsettled law, Cross-Petitioner ignores the Copyright Office's statement that the present law in this field is unsettled and that its clarification is necessary. (See *Petition in* No. 649, pp. 16-17). Cross-Petitioner's only answer is that Congress can change the law if it wants to do so; this is but an admission that the law is unsettled.

Cross-Petitioner contends that this Court is incompetent to deal with the question of unsettled law (p. 13). We reject such argument. If this Court applies to the facts of the instant case the legal doctrines it has elsewhere enunciated as to the scope of "official duty" of a Government officer (see Petition in No. 649, pp. 8-11), or the legal rules applied by the Courts of Appeals for the Second and Eighth Circuits in copyright cases, this Court's decision will be fully effective not only in dealing with this particular case, but also in setting a clear policy that can prevent conflicts with the law described in the Petition in No. 649 at pages 18-22.

V. Unsettled Constitutional questions.

Cross-Petitioner would abolish the Freedom of Press provision of the First Amendment. He argues that there is no Constitutional issue of Freedom of Press in this case because the only protection to the press is through the doctrine of "fair use"

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[28] A contrary decision by this Court is all the more reason for granting the Petition in No. 649, in order that the Bench, the Bar, the Government and the public at large may know which of two allegedly applicable lines of decisions of this Court are to control, those defining "official duty" or those in the patent realm.

(p. 14).[29] Thus summarily stripped of Constitutional standing and guaranty, Freedom of Press would be relegated to the role of a non-statutory exception to Copyright Act. Gone would be the public's "right to know;"[30] gone the safeguard of "the widest possible dissemination of information from diverse and antagonistic sources;"[31] gone the "right of freely examining public characters and measures, and of free communication thereon;"[32] gone the protection for "dissemination of controversial information which the public is entitled to receive[33] — gone, as Constitutional rights,[34] all these and other attributes of a Free Press.

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[29] "Fair use" is an undependable reed for a free press to lean upon. The Copyright Office has said, "Fair use is not a predictable area of copyright law." Latman, FAIR USE OF COPYRIGHTED WORKS, Copyright Office Study No. 10, p. 13 (mimeo. Aug. 1958). Another commentator has said that, "There is no agreement on the nature of the doctrine" and has pointed to the "confusion as to the nature and source of the doctrine," Needham, *Tape Recording, Photocopying and Fair Use*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 6, p. 75 (1959). See Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661, 662 (2d Cir. 1939) (Fair use is "the most troublesome problem in the whole law of copyright"). *Cf also*: Cohen, *Fair Use In The Law Of Copyright*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 6, 43, 46 (1955).

[30] H. Rep. No. 1758, 85th Cong., 2d Sess. 17 (see Petition in No. 649, p. 25).

[31] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[32] 6 WRITINGS OF JAMES MADISON 398 (1906 ed.) In the exercise of its Constitutional rights a Free Press is not limited in quoting from the text of official statements. However, the doctrine of "fair use" will not permit quotation of substantial portion of such important materials. Benny v. Loew's, Inc. 239 F. 2d 532, 536-7 (9th Cir. 1956), aff'd per curiam by equally divided court, 356 U.S. 43 (1958); Toksvig v. Bruce Pub. Co., 181 F. 2d 664,666 (7th Cir. 1950).

[33] U. S. Government's Brief before this Court, quoted in Petition (No. 649) at pp. 24-25.

[34] "Fair" use is only a privilege not a right, 3 VILL.L.REV. 381, 383 (1958.) Furthermore it is not even a question of law: ". . . the issue of fair use is a question of fact." Eisenschiml v. Fawcett Publications, Inc., 246 F. 2d 598,604 (7th Cir. 1957) *cert. denied* 355 U.S. 907 (1957).

Nowhere is there the slightest scintilla of legal justification for such bizarre Constitutional interpretation. Cross-Petitioner's argument eviscerates the First Amendment's guaranty of Freedom of Press.

On the other hand, this Court guards First Amendment rights "with a jealous eye."[35] Cross-Petitioner's extraordinary proposal would fly directly in the face of this Court's pronouncement that

> ". . . the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[36]

Petitioner in No. 649 respectfully submits that the Cross-Petitioner's improper use of copyright to deny the American people and press the right of access to or even of quotation from his official statements publicly made as a top-level Government official presents a serious constitutional question involving Freedom of Press under the First Amendment.

Cross-Petitioner would deny Petitioner freedom of press because he is a so-called "free rider" (p. 14). By the same token the press at large is also a "free rider." Cross-Petitioner's claim in this regard indicates his fundamental legal position: *i.e.*, that any segment of the press can at his will or whim be denied not only the Constitutional right of Freedom of Press but even Cross-Petitioner's substituted "right" of "fair use."

Petitioner submits its Petition in No. 649 on the substantive basis of important issues of law such as the major undecided questions of Constitutional law, the unsettled problems of statutory construction, and the unresolved conflicts with applicable decisions of this Court and of other Courts of Appeals.

The expressed will of Congress that "Government publications" shall not be copyrighted, and the substantial evidence

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[35] A.F.L. v. Swing, 312 U.S. 321, 325 (1941).

[36] Bridges v. California, 314 U.S. 252, 263, 256 (1941).

of conflicts with or evasions of this Congressional policy,[37] as outlined in the Petition in No. 649 (pp. 18-22, and Appendices E-K), speak for themselves.

CONCLUSION

For the foregoing reasons, both the Petition in No. 649 and the Cross-Petition in No. 739 should be granted.

Respectfully submitted.

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March 1961

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[37] The Petition (No. 649) outlined eight categories of conflicts with or evasions of the Copyright Act (pp. 18-22). For official confirmation that the Air Force, Army, Navy, A.E.C. and N.A.S.A. have engaged in self-styled "gimmicks" to evade statutory restrictions upon Government agencies and personnel, see testimony of N. E. Halaby, Federal Aviation Administrator-Designate, before U.S. Senate Committee on Interstate and Foreign Commerce, Feb. 21, 1961, *Official Transcript*, pp. 19-26 and 61; Washington Post, Feb. 22, 1961, p. A4, col. 4-5.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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2. That the Admiral's speeches drew on his experience in the Navy and were in the best interests of the United States and the Navy did not deprive him of his rights in his material 35

B. The incidental use of some Government stationery and secretarial services did not convert private literary material into Government property 37

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 36 and No. 55

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS

v.

VICE ADMIRAL HYMAN G. RICKOVER

VICE ADMIRAL HYMAN G. RICKOVER

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR VICE ADMIRAL HYMAN G. RICKOVER

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 177 F. Supp. 601 and appears in the Transcript of Record[1] (R. 36-45).

[1] The record before the Court includes the original record certified to the Court of Appeals. A part of this record has been printed and reference to it is by "(R.—)". Pages 3-46 of the printed record are stamp-numbered at the bottom of each page and pages 47-111 bear printed numbers at their upper outside corners.

Counsel have stipulated that they may refer to unprinted portions of the certified record. Reference to such portions will be by "Ex.—".

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 47-64) is reported at 284 F. 2d 262 but it is not yet reported in U.S. App. D.C.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1960 (R. 65-66) and modified January 17, 1961. The petition for certiorari in No. 36 (No. 649, 1960 Term) was filed on January 14, 1961. On January 17, 1961, this Court extended the time to February 17, 1961 in which to file a conditional cross-petition for a writ of certiorari (R. 66). The conditional cross-petition for a writ of certiorari in No. 55 (No. 739, 1960 Term) was filed on February 17, 1961. On March 20, 1961, this Court granted certiorari in both cases and consolidated them (R. 67). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Case No. 55 involves Article I, Section 8, Clause 8 of the Constitution of the United States; Sections 2, 10, 12, 13, 24 and 26 of the Copyright Law (17 U.S.C. §§ 2, 10, 12, 13, 24, 26); and Section 202.6 of the Rules and Regulations of the Copyright Office of the Library of Congress (37 C.F.R. § 202.6).

Case No. 36 involves Article I, Section 8, Clause 8 of the Constitution of the United States and the First and Fifth Amendments thereto; Section 52 of the Printing Law of 1895 (c. 23, § 52, 28 Stat. 608; 44 U.S.C. § 58); Section 8 of the Copyright Law (44 U.S.C. § 8); and Article 1252 of the Navy General Regulations.

Relevant portions of the constitutional provisions, statutes, and regulations involved are printed in the appendices, pp. 1a-9a, *infra*.

QUESTION PRESENTED IN NO. 55

Whether the writer of a speech prepared for delivery by himself at a public function loses his rights of ownership in the speech by distributing copies of it, at the time of oral delivery, to reporters and to certain other interested persons in the form of a multilithed press release, not copyrighted and bearing no notice of copyright, the heading of which identifies the text as a speech prepared for delivery on the occasion, and at the time and place, specified.

QUESTION PRESENTED IN NO. 36

Whether a Vice Admiral of the United States Navy is entitled to own certain literary material,—speeches, —written and delivered by him otherwise than as a part of, or in the course of, his regular duties and not pursuant to official assignment of any kind.

STATEMENT OF THE CASE IN NO. 36 AND NO. 55

The petitioner in No. 55, a Vice Admiral of the United States Navy and Assistant Director for Naval Reactors, Atomic Energy Commission, made a number of speeches, commencing in 1955, on matters of public interest. (R. 37).

I. The Nature of the Speeches

The speeches (R. 48 and Ex. 15, R. 26, 105-107) were not made pursuant to orders or as a part of the Admiral's official duties (R. 56, Ex. 24, R. 27, 111). Some of the ideas expressed were developed by the speaker in connection with his activities as a Naval

officer (R. 37) but the basic theme of the speeches (Ex. 6-A, R. 32) is that the education system in the United States is in need of thorough survey and overhaul.

II. The Dispute Over Publishing Rights

In late October 1958, shortly after the Admiral delivered the twenty-second of his speeches he was asked by the petitioner in No. 36, a book publisher with offices in the District of Columbia, for copies of certain of the speeches and for permission to publish them in book form (Ex. 1, R. 6, 12, 68). The copies were made available but permission to publish the speeches in whole or in part was denied by the Admiral (R. 6) because they were to be published in a book in the near future (Ex. 2, R. 12, 68). More than three months earlier the Admiral and E. P. Dutton & Co., Inc. of New York had contracted (Ex. 16, R. 6, 27, 108) for the publication of a book based in part on his speeches. E. P. Dutton & Co., Inc. gave written notice to the Washington book publisher, in early November 1958 (Ex. 5, R. 6, 13), that an action would be brought if the Admiral's rights in his speeches were infringed. The Rickover-Dutton book, *Education and Freedom* (Ex. 19, R. 7, 27), was published in January 1959 (Ex. 20, R. 7, 27).

III. The Copyrighting of Some of the Speeches

Of the twenty-two speeches made prior to the approach of the Washington book publisher, none had been copyrighted but on all copies of his next speech, "Education—Our First Line of Defense" (Ex. 9, R. 7, 20, 95), prepared for delivery on December 17, 1958, the Admiral placed a notice of copyright in his name,

"H. G. Rickover", and copyrighted the speech as a published work (Ex. 18, R. 7, 27).

Thereupon the Washington book publisher brought this action to secure an adjudication that would declare in effect that the Admiral "has no property right in his speeches; that they are not subject to copyright; that any one is free to publish them at will without paying him any royalty or other compensation; and that he may not cause any person to be restrained from reproducing them, in whole or in part." (R. 37)

IV. The Preparation of the Speeches

The basic question of the Admiral's right to own and control these writings of his was decided in his favor by the trial court (R. 41) and affirmed unanimously by all three members of the Court of Appeals (R. 56, 62 and 64). The Admiral had personally prepared all of the speeches on "his own time" (R. 7, 8), writing them out in longhand at home or while traveling (R. 8) and a large part of the drafts and some of the final copies were typed by Mrs. Rickover at home (R. 8). While some of the final drafts and a multilith master of each speech were typed by the Admiral's secretary at his office and the speeches were multilithed on Government duplicating machines (R. 8), it was held that title to literary property ought not depend on such minor considerations (R. 41). The trial court and the appellate court agreed that the controlling element was that the writing and delivering of the addresses by the Admiral were not "part of his official duties" (R. 40) and not "called for by his official duties" (R. 56).

However, with respect to the speeches delivered before December 1, 1958, two members of the Court

of Appeals decided that the Admiral had forfeited his rights of ownership (R. 57) in those speeches of which copies were distributed by the Admiral without bearing a notice of copyright. Circuit Judge Washington, dissenting, said in part,

> "It is clear that Admiral Rickover intended to foster (fol. 65) the widest public dissemination of his words—as current news—for the sake of advancing his own views and programs. But I think that it is equally clear that he meant to preserve, and actually did preserve, the exclusive right to publish the speeches in compiled form after their immediate news value had passed away. * * * As 'news' they deserve the widest unfettered contemporaneous dissemination. Where, as here, an author seeks to advance this end by making copies of his speeches available to the press and other interested persons, he is serving the public's interest as well as his own." (R. 63).

While the trial court was sustained as to the Admiral's rights of ownership in his copyrighted speeches, it was reversed as to the early uncopyrighted speeches. The nature and effect of the distribution of copies of such uncopyrighted speeches present the question involved in No. 55.

V. The Distribution of the Speeches

The copies distributed were in the form of multilithed press releases (Ex. 6-B, R. 13, 14) and were individually clearly labeled as "Remarks Prepared" by Admiral Rickover for delivery at a specified function (Ex. 6 B-1, R. 69) or as "Address By" the Admiral (Ex. 6 B-14, R. 81) for delivery at a specified time and place. The prominent heading included the words "News Release" and words such as "Please

Note Date" and "Hold for Release until Delivery of Address Expected About 12:00 Noon (EST) Friday, March 1, 1957" (Ex. 6 B-8, R. 74).

Copies of all of the speeches except two were distributed to the press and to individuals who had requested copies or who the Admiral believed would be interested in the subject. Approximately fifty copies were sent to the sponsoring organization, in the case of some speeches, to be made available to the press and others at the place of delivery. Some copies were sent to the Press Club in Washington for the use of representatives of the press (R. 8).

The Court of Appeals, having decided by a divided vote that the Admiral's rights in some of his speeches had been lost by such distribution of copies, then made provision for consideration by the trial court, on remand, of the question of fair use. The trial court was directed to decide the extent to which the Washington book publisher might publish quotations from the balance of the speeches,—those prior to December 1, 1958, which were not distributed and those after December 1, 1958, which were copyrighted,—in which the Admiral's rights of ownership had been unanimously recognized and upheld.

On October 20, 1960, judgment was entered in the District Court awarding the plaintiff-appellant its taxable costs on the appeal. On January 17, 1961, on consideration of defendant-appellee's motion to recall and modify the judgment an order was entered by the Court of Appeals recalling and modifying the judgment to provide that each party bear its own costs.

This Court by its orders of March 20, 1961, granted certiorari in No. 36 (No. 649, 1960 Term) and No. 55

(No. 739, 1960 Term) and consolidated the cases (R. 67). The date for filing printed briefs was fixed as September 15, 1961 with provision for a prior exchange by the parties of typewritten affirmative briefs.

SUMMARY OF ARGUMENT

The Admiral's rights of ownership in his speeches accrued to him as the speeches were written. Such rights continue until copyright is acquired under an appropriate statute or the owner makes an unlimited distribution of copies of the material under circumstances indicating that the rights must be deemed abandoned or forfeited.

The distribution made of copies of the early speeches bearing no notice of copyright was not such as to terminate the common law rights of ownership. The law looks with disfavor on the forfeiture of the author's rights of ownership and favors the author in doubtful cases.

The term "publication" has two meanings in copyright law. The first refers to that publication which is necessary to secure copyright in a published work under the statute and this, properly called investitive publication, involves minimal distribution. The second type of publication, divestitive publication, is that distribution of copies not bearing a notice of copyright which will be deemed, under the attendant circumstances, to constitute an abandonment of rights.

The number and nature of the copies distributed and their manner of distribution in this case was not such as to spell out a forfeiture. The material was not a book, it was a speech clearly marked as such for oral delivery at a time and place stated. The persons to whom distribution was made were reporters and in-

terested persons and not the general public within the meaning of the cases dealing with unlimited publication. The number of copies distributed was less than some distributions which have been held not to be dedications.

The oral delivery of the addresses did not constitute a general publication and to add the element of "performance" to a description of the number and manner of distribution of copies is not sound. Under all the circumstances of the case the holding by the majority of the Court of Appeals that there was a general, unlimited publication which dedicated the material to the public domain should be reversed.

Individual Versus Government Ownership of the Admiral's Speeches

Since the Admiral did not make the speeches as part of his official duties or pursuant to orders, the material he wrote and delivered orally belonged to him personally and not to his employer, the government. That the Admiral's interest in the subject of education was aroused by his experience in the Navy does not make his speeches the property of the United States. That his speeches, aiming to improve educational methods, were in the best interests of the United States, and incidentally of the United States Navy, did not deprive him of his rights in the material.

The use of some government personnel and equipment in the making of copies of the speeches for distribution is a minor consideration not affecting the substantive right of private ownership in the literary material itself. The preparation of some multilithed copies of the speeches was necessary as a practical

matter to comply with the requirement of the Defense Department Directive that writings for publication by Defense personnel as individuals be submitted to the Office of Security Review for clearance and to comply also with the requirements of the Navy Department Regulations that copies of such material be supplied to the Secretary of the Navy for the files of the Department.

If it were determined that speeches such as these belong to the government rather than to the author on completion, they would go into the public domain if, as and when they were published by the government. In that event they would belong to no one because of the provision in the Copyright Act (17 U.S.C. § 8) that no copyright shall subsist in "any publication of the United States Government." Such a determination would be inequitable and serve no useful purpose. Any publisher would then be able to market the speeches without securing the writer's permission and without incorporating any changes or additions desired by the writer for their publication in book form as distinguished from their individual oral delivery.

The Government has asserted no claim in these speeches although invited to do so. On the contrary it has taken the position that the speeches were made in a private, rather than a governmental, capacity.

The Admiral's speeches added to the sum of human knowledge and his initiative in assembling his thoughts and making them public should be encouraged and rewarded. There was no bottling up of news and no question of freedom of the press is presented. Each speech expressly invited contemporaneous press use of the material, or, more specifically newspaper or news periodical use. Even if it had not done so, the press

could have used part or all of the material according to its judgment of what was newsworthy.

Copyright protects the form in which ideas are expressed but the ideas themselves may be freely used and circulated by anyone. The "news" element, the information concerning current developments, contained in a literary production, is not the subject of copyright. Any newspaper, news service or news periodical would be completely justified in quoting extensively and even in full from a speech of a government official in order to inform its readers with respect to his views and his activities and this would be so whether the statements were his own private statements, copyrighted or uncopyrighted, or official statements made by him for and on behalf of the government.

Under the doctrine of "fair use" any writer may make reasonable quotation from a protected work whether it be protected under common law principles or pursuant to copyright obtained under a statute.

There is no conflict between the Copyright Law and the freedom of speech and of the press guaranteed in the First Amendment. These guarantees do not mean that strangers to the act of creation may take and use without permission material belonging to its author.

The unanimous findings of fact should not be disturbed. The conclusion of law reached by the trial court and the Court of Appeals that these speeches belonged to the Admiral rather than the Government should be affirmed. As stated above, the conclusion of law reached by two of the members of the Court of Appeals that the distribution of the early uncopyrighted speeches dedicated the materials to the public domain should be reversed.

THE ARGUMENT

I. THE ADMIRAL'S RIGHTS OF OWNERSHIP IN HIS SPEECHES ACCRUED TO HIM AS THE SPEECHES WERE WRITTEN AND ENDURE UNTIL (a) COPYRIGHT IS OBTAINED UNDER THE FEDERAL STATUTE OR (b) THE WORK IS PUBLISHED WITHOUT COMPLYING WITH THE STATUTE.

The author's rights of ownership in his writings are recognized on principles of natural justice. Drone, in *The Law of Property in Intellectual Production* (1879) says at page 5:

> "Ownership, then, is created by production, and the producer becomes the owner. This principle is general, and covers all productions,—the whole field of labor. It cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or of the mind. * * * "

However, at an early date it was established that the rights of an author do not include the right to "publish" copies of his work, that a "publication" of the work terminates the author's pre-existing rights and that his rights in the work thereafter are those acquired by him under an appropriate statute. *Wheaton* v. *Peters*, 8 Peters 591; *Donaldson* v. *Becket*, 4 Burr. 2408.

In the United States the Constitutional foundation for the federal copyright statute is Article I, Section 8,—

> "The Congress shall have power * * *; (Clause 8)
>
> * * *
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The first Copyright Act, the Act of 1790, granted to the author of any "map, chart, book or books" printed in the United States the sole right to publish and sell copies of the work for fourteen years upon complying with certain formalities and also provided for the preservation of the common law right of authors in their unpublished works. (Sec. 1 and Sec. 6 of the Act of May 31, 1790, c. 15, 1 Stat. 124).

The same situation prevails today. Section 2 of the Copyright Act (17 U.S.C.) reads:

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

Wheaton v. *Peters* (*supra*) was the first copyright case to come before the Supreme Court. It held that the rights granted by the statute, the Act of 1790, were new rights. With respect to common law rights it said,

> "As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery. * * * " (8 Peters at 661).

With respect to the right of making and publishing copies it said,

> "This right, as has been shown, does not exist at common law—it originated, if at all, under the acts of Congress. No one can deny that when the Legislature are about to vest an exclusive right in an author or an inventor, they have the power

> to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law." (8 Peters at 663-4).

Mazer v. *Stein*, 347 U.S. 201, most recently enunciated the same principle, 347 U.S. at 214-15.

The question presented in this case is: What constitutes substantial compliance with the "requisitions of the law" and, specifically, whether the Admiral's early uncopyrighted speeches were "published" or "unpublished" in the light of the concepts of "publication" which have been developed in judicial interpretations of the federal copyright statute.

II. THE DISTRIBUTION BY THE ADMIRAL OF PRESS RELEASES OF HIS SPEECHES WITHOUT NOTICE OF COPYRIGHT DID NOT CONSTITUTE A PUBLICATION OF THE SPEECHES OF SUCH WIDE AND GENERAL NATURE AS TO TERMINATE HIS COMMON LAW RIGHTS OF OWNERSHIP IN THEM.

A. There are two types of publication: investitive and divestitive.

The correct answer to this question requires a full appreciation of two vastly different, co-existing meanings that the word "publication" has acquired in the field of copyright.

The first meaning is that associated with the statement: Copyright may be acquired by publication with notice of copyright. The second meaning is that implicit in the statement: Publication of a work, without notice of copyright, terminates the common law rights.

These two meanings of the word publication, radically different, are appropriately classified as Investi-

tive Publication and Divestitive Publication. Brown and Kaplan, *Cases on Copyright* (1960), 52-64, DeWolf, *An Outline of Copyright Law* (1925), 32.

B. Investitive publication is merely a formal compliance with the Copyright Act.

Investitive publication, that which will constitute a compliance with Section 10 of the Copyright Act in securing copyright in a published work, is minimal. The unrestricted sale of a single copy of a song, without any effort to push the work commercially, is enough, *Stern* v. *Jerome H. Remick & Co.*, 175 Fed. 282 (C.C. N.Y.). Deposit of copies of a motion picture film with the Librarian of Congress was held sufficient in *Cardinal Film Corp.* v. *Beck*, 248 Fed. 368 (D.C.N.Y.). The sale of one of three galley proofs of an open letter from Al Smith having great news value was held sufficient even though the sale was to an officer of the applicant for copyright registration and the sale price was only ten cents. *Atlantic Monthly Co.* v. *Post Publishing Company*, 27 F.2d 556 (D. Mass.).

C. Divestitive publication is one so broad and general as to indicate an abandonment of rights.

Divestitive publication, on the other hand, usually called "general publication", is a vastly different matter. Reluctant to decree the destruction of hard-earned rights, and often as a result of balancing the equities of an author against those who seek to use his material freely and free of charge, the courts have developed a concept of that type of publication which will divest an author of his rights as a wide and indiscriminate circulation of copies of the work product. As a corollary, to serve as a counterpart of "general publication", there has grown the practice of referring to a

publication which is less than general and, therefore, not divestitive, as a "limited publication".

The cautious approach of the courts to this question and their endeavor not to reach a determination that any given publication of copies without notice of copyright shall be deemed to have terminated common law rights is in accord with the philosophy of concern for the author which underlies the decision of this Court in *Washingtonian Publishing Co., Inc.* v. *Pearson*, 306 U.S. 30. There it was said, in holding that a copy deposited fourteen months after publication had been "promptly deposited" as required by 17 U.S.C. § 13 (then Section 12), "Such forfeitures are never to be inferred from doubtful language." 306 U.S. at 42.

There is no definition of "publication" in the Copyright Act to serve as a guide. Section 26 of Title 17 U.S.C. defines "the date of publication" but merely to fix the beginning of the term of copyright as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed * * *". This, as Judge Augustus N. Hand said in *Cardinal Film Corp.* v. *Beck*, 248 Fed. 368, 369, (D.C.N.Y.) "was an enactment to fix the date from which the copyright term should begin to run, and not a general definition of what constituted publication". Cited with approval in *F. B. Patterson* v. *Century Productions, Inc.*, 93 F.2d 489, 492 (2 Cir.).

Section 26 is derived from Section 62 of the Copyright Act of 1909. Prior to 1909 there was no need for such a definition because the term of copyright ran from the time of recording the title in the Clerk's office and depositing copies. The Act of 1909 provided for the securing of copyright in a work as a published

work "by publication thereof with the notice of copyright required by this title", 17 U.S.C. § 10. Deposit and registration became conditions subsequent and the term was fixed as running from the "date of publication". Section 23 of the Copyright Act of 1909, now 17 U.S.C. § 24.

In addition, the Act of 1909 made provision for copyrighting, as unpublished works, certain material including lectures, dramatic and musical works, "of which copies are not reproduced for sale". Section 11, Copyright Act of 1909, now 17 U.S.C. § 12. The commencement of the term of copyright for unpublished compositions is not specified in the statute but in *Shilkret* v. *Musicraft Records,* 131 F.2d 929 (2 Cir.), certiorari denied, 319 U.S. 742, it was held that the words "date of first publication" in 17 U.S.C. § 24 refer to the date of registration of an unpublished work.

The Committee Report (H.R. Rep. No. 2222, 60th Congress, 2d Session) recommending the passage of the Copyright Act of 1909, takes up each section of the bill in numerical order, notes that under Section 9 (now 17 U.S.C. § 10) copyright will be effective "upon the publication with notice" and in discussing Section 23 (now 17 U.S.C. § 24) deals with the new length of term but not with the date of its commencement. With respect to Section 62 (now 17 U.S.C. § 26), defining the words "the date of publication", the report merely states that it "places an interpretation and construction upon the use of certain words".

The language of the majority opinion of the Court of Appeals takes this "definition" of the date of publication in 17 U.S.C. § 26 which it concedes is not directly applicable, states that it "does give some in-

dication of Congressional thinking on the subject" (R. 57) and, in effect, interprets the words "public distribution" to mean "any public distribution" (R. 59).

The majority opinion quotes the statutory definition in the British Act (Copyright Act, 1956, 4 and 6 Eliz. 2, c. 74) (R. 57-58) which states that a work shall be taken to have been published if "reproductions of the work or editions have been issued to the public". It then quotes (R. 58) from Copinger and Skone-James' work (*Copyright*, 9th edition, 1958, 21, 30) which uses practically the same words as the statute, as follows:

> "Prima facie, a literary, dramatic or musical work, or an edition of such work or an artistic work, is published if, but only if, reproductions of the work have been issued to the public * * *"

The majority then concludes, notwithstanding a reference to the need for a liberal attitude in protecting any work in its passage from the so-called "nonproductive" common law rights of an author (R. 58), that the "definition" of publication for commencing the term of copyright should be the "measure for the meaning of publication for release of authorship rights" (R. 59).

This misses the fundamentals of the proper approach to the status of the rights of authors whose works have been distributed quite widely but not so widely that an implied intention to abandon should be found to exist. It is one hundred eighty degrees out of phase with what Judge A. N. Hand said in *Cardinal Film Corp* v. *Beck*, 248 Fed. at 369, that Section 26 was "not a general definition of what constituted publication."

Of the numerous cases dealing with this subject of limited publication, the outstanding assemblage of authorities and reasoning on the subject is that contained in *White* v. *Kimmell*, 94 F. Supp. 502 (S.D. Cal.), in which Judge Yankwich dealt, in an action for a declaratory judgment, with a set of facts involving wide distribution of a portion of a book known as the Gaelic manuscripts. In *White* v. *Kimmell*, on appeal, according to the Circuit Court, at least as many as 200 copies of the work were put in unrestricted circulation over the long period between 1933 and 1946. 193 F.2d 744, 747-8 (9th Cir.). The District Court's opinion placed great weight on *"The nature of the subject-matter, the character of the communication, circulation or exhibition, and the nature of the rights secured"* (94 F. Supp. at 506) in arriving at its decision that there had been but a limited publication which did not operate to dedicate the author's rights to the public domain.

The District Court was reversed by the Court of Appeals which, after reviewing the facts and emphasizing the breadth and nature of the distribution of copies, paid tribute to the District Court's opinion in the following language:

> "The trial judge's opinion contains a comprehensive and concededly accurate survey of the judicial precedents relating to limited publication, and there would seem to be no justification for our duplicating his efforts in that direction." 193 F. 2d at 746.

but proceeded to say that

> "The respect in which we are constrained to disagree with the judge is in the application of the stated legal principles to the facts of the case." 193 F. 2d at 747.

It is essential to note that one of the principal elements of the thinking of the Court of Appeals, in reversing the District Court in *White* v. *Kimmell*, was the fact that the material distributed was a portion of a book and not, on its face, a speech or address. The Court of Appeals itself makes the distinction in the following words, 193 F. 2d at 747:

> "Nor is it thought that the case is comparable to those involving publication of lecture notes, or the distribution of copies of a minister's sermon among the members of his congregation, or kindred cases relied on below. It is by such assimilation that the trial court endeavors to satisfy the criterion of the distribution being limited to a specific purpose. But White does not appear in the record as a teacher or as a propagandist endeavoring to persuade. He is not pictured as a man with a message. His only apparent purpose was to enable any persons interested to obtain a copy of the manuscript. No other motive is discernible."

In view of this language of the Circuit Court there is no doubt that if the material distributed in *White* v. *Kimmell* had been speeches, labeled as such, as in this case, the Circuit Court would have agreed with the District Court's decision that there was no dedication. This fundamental distinction was apparently overlooked by the majority of the Court of Appeals in relying on the Circuit Court of Appeals reversal of Judge Yankwich in *White* v. *Kimmell*.

It is not contended that the danger of a divestitive publication is limited to works of which copies are offered for sale merely because there is a commercial connotation to the words "the first authorized edition" in 17 U.S.C. § 26 or because lectures are grouped with other works not reproduced for sale "and the copyright

proprietor is not exempted from the deposit requirement where the work is later reproduced for sale". 17 U.S.C. § 12, 37 C.F.R. 202.6. However, it is urged that the non-commercial nature of this distribution of copies should be given weight.

If the purpose of producing these copies of speeches in advance had been to sell them, the overall nature and effect of the distribution would have been substantially different. These copies were merely made available for the aid of the press representatives covering the speeches in order to facilitate accurate quotation and also for the information of the speaker's friends and those he knew to be interested in the subject to spread the word of his personal crusade for improvement in educational methods.

D. The copies distributed were not books or parts of books: they were clearly marked as speeches prepared for oral delivery.

The nature of what was distributed by the Admiral is especially significant. These copies were clearly marked as addresses prepared for oral delivery. They were not, and did not resemble, books. The primary usage of books is through the multiplication and sale of copies; the primary usage of speeches is through their oral delivery.

In view of these circumstances the distribution of these press releases ought not be deemed to be a general or divestitive publication. The number of copies distributed, within reasonable limits, ought not be a criterion. It is "the nature of the subject matter, the character of the communication, circulation or exhibition and the nature of the rights secured" which are chiefly determinative of the question of publication. *Werckmeister* v. *American Lithographic Co.*, 134 Fed.

321 (S.D.N.Y.) The number of copies of each speech distributed is not specified in this record other than as summarized in Paragraph 3 of the Statement of Facts (R. 8). However, it is not conceded that the total number was nearly as large as the number of copies distributed in *White* v. *Kimmell* (*supra*). It is believed that the opinion of the majority of the Court of Appeals (R. 60), in separately enumerating "distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches", provides undue exaggeration of the number of copies which were distributed.

A wide distribution of a translation of copyrighted work in mimeographed copies to theatrical producers to induce them to produce the work was held to be not a dedication in *Ilyin* v. *Avon Publications, Inc.*, 144 F. Supp. 368 (S.D.N.Y.) even though no notice of copyright was on the copies. In the District of Columbia circuit, the case of *Hirshon* v. *United Artists Corporation*, 100 U.S. App. D.C. 217, 243 F.2d 640, decided that the distribution to broadcasting stations and professional musicians for plugging purposes of some 2,000 printed copies of a song did not operate to dedicate the rights to the public domain even though the copyright notice was unauthorized.

In *Continental Casualty Co.* v. *Beardsley*, 151 F. Supp. 28, affirmed, 253 F.2d 702 (2 Cir.), it was held that the distribution of 100 printed copies of a pamphlet bearing no notice of copyright was a general publication. The publication was distributed gratis for the purpose of securing business.

The distribution to students of papers describing a system of bookkeeping was not such a publication as

operated to divest the lecturer of his rights. *Bartlett* v. *Crittenden*, 2 Fed. Cas. 967, No. 1076 at 970 (C.C.D. Ohio). To the same effect, see *M'Dearmott Commission Co.* v. *Board of Trade*, 146 Fed. 961 (C.C. Mo).

E. The delivery of a speech does not publish it.

Nutt v. *National Institute Incorporated for the Improvement of Memory, Inc.*, 31 F.2d 236 (2 Cir.), held that the delivery of lectures did not constitute a publication of the lectures and said that "Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they have not obtained the right to sell". 31 F.2d at 238.

The performance of an uncopyrighted drama upon the stage does not constitute a publication, *Ferris* v. *Frohman*, 223 U.S. 424, and the same rule is applied to broadcast programs. *Uproar Co.* v. *National Broadcasting Co.*, 8 F. Supp. 358 (D. C. Mass.), affirmed, 81 F.2d 373 (1 Cir.). Related cases on the subject are collected in Nimmer, *Copyright Publication*, 56 Columbia Law Review 185. The law with respect to the non-dedicatory effect of a performance is so well established that it is difficult to understand why the oral delivery of the speeches should be included with the fact of distribution of copies by the majority of the Court of Appeals in arriving at the conclusion that "these acts, in their totality, constitute publication" (R. 60).

Judge Learned Hand in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 191 F.2d 594 (2 Cir.), summarized his views on the loss of rights in copyrighted material in ruling on the effect of distributing mats of comic strips to newspapers

without proper copyright notice. Copyright in some of the strips was held to have been abandoned but the Court adopted a liberal view with respect to defective and occasionally omitted notices and notices omitted through no fault of the copyright owner. The surrounding circumstances played some part in the Court's thinking for it said (191 F.2d at 603), "We are unwilling to allow a bare-faced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public."

With respect to abandonment and forfeiture, Judge Hand said "We do not doubt that the 'author or proprietor of any work made the subject of copyright' by the Copyright Law (footnote omitted) may 'abandon' his literary property in the 'work' before he has published it, or his copyright in it after he has done so; but he must 'abandon' it by some overt act which manifests his purpose to surrender his rights in the 'work', and to allow the public to copy it." (191 F.2d at 598). Judge Hand then distinguishes the terms "dedication", "abandonment" and "forfeiture", pointing out that the first two presuppose an intentional surrender whereas "forfeiture" does not.

Rights of ownership may be forfeited but not under the circumstances of this case.

In this case the nature of the material distributed and its manner of distribution militate against a finding of abandonment or forfeiture and, as Circuit Judge Washington said in his dissent, the Washington book publisher "comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the (fol. 67) speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. * * * " (R. 64).

III. THE ADMIRAL—NOT THE UNITED STATES GOVERNMENT—ACQUIRED THE RIGHTS OF OWNERSHIP IN THE SPEECHES AS HE WROTE THEM.

The principal question presented in this case is whether the Admiral, putting aside for the moment any question of divestitive publication, is entitled to own and control the literary material written by him under the factual circumstances established in the record. The question was properly decided in his favor by both the trial court and the Court of Appeals.

A. Neither the writing nor the delivery of the speeches was pursuant to orders or a part of, or in the course of, the Admiral's official duties.

The trial court found that the writing and delivering of the speeches were no part of the Admiral's official duties (R. 40). The Court of Appeals unanimously agreed, saying that they were not governmental publications because they were not "called for by" the Admiral's official duties nor were they "explanations as guides for official action" (R. 56, 64).

The trial court recognized that the speeches had "some bearing on" the Admiral's official duties (R. 40) but their drafting and delivery was "no part of" his official duties (R. 40) and since "no one sells or mortgages all the products of his brain to his employer by the mere fact of employment" (R. 40) the speaker's intellectual products are his own and "do not automatically become the property of the Government" (R. 40). In full agreement, the Court of Appeals ruled that, "It cannot be properly said, as appellant asserted, that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions." (R. 56).

1. The Admiral was acting in an individual capacity and not as a representative of the Government in making his speeches and in protecting his rights in them.

The speeches were written to express the Admiral's personal views (Ex. 24, R. 27, 111). Nowhere do they purport to express or explain official attitudes or pronouncements. The first paragraph of Chapter I of Admiral Rickover's book, *Education and Freedom* (Ex. 19, R. 27), published on January 8, 1959 (Ex. 20, R. 27) before this action was commenced (R. 6), establishes his thesis as follows:—

> "This book is a collection of speeches made during the last four years. Some have been shortened, others expanded, and some new material has been added to produce an orderly sequence. There is no Aristotelian unity in it but each chapter touches on some aspect of education and freedom. Each, whether or not it deals with education directly, points up the need of better schooling for all our children—education far superior to anything we in this country have ever had or ever needed in the past. Only massive upgrading of the scholastic standards of our schools will guarantee the future prosperity and freedom of the Republic." (Ex. 19, p. 15)

He made no attempt to hide the obvious fact that his thoughts and conclusions were based on his own experience and observations in the service of his government as well as outside it:—

> "This is a conclusion which I reached as a result of my personal experience with developing a new source of power—nuclear fission. Engaged in research, development, and building of nuclear power plants as the Atomic Energy Commission and the Navy are, we found that this could not be done unless we raised our thinking and our actions to technological levels well above those prevailing

> at the time. * * * In one sense, this book represents my groping for an answer why so many road blocks, technical and nontechnical, delayed building a nuclear navy as fast as I consider essential to the security of the country. In a broader sense, the conclusions I reached apply to delays hindering *all* attempts at technological breakthroughs; they seek to pin point the elements which hinder all new development projects, * * *. (Ex. 19, pp. 15, 16)

The majority opinion of the Court of Appeals concludes that "A perusal, (fol. 58) even of the titles and the places of delivery alone, should be sufficient to show that these addresses were not governmental in that sense." namely, "statements called for by his official duties or explanations as guides for official action" (R. 56).

Long prior to the passage of a statute on the subject the question of private versus government ownership of literary property arose in connection with the rights asserted by court reporters in their reports of judicial proceedings. It was held that while the opinions themselves could not be copyrighted, the marginal notes or head notes of the cases and points decided, the abstract of the records, evidence and arguments and the index, represented the individual work of the reporter in which he was entitled to copyright protection. *Callaghan* v. *Myers,* 128 U.S. 617; *Wheaton* v. *Peters,* 8 Peters 591.

Another early case, decided by a federal circuit court in the absence of statute, was *Heine* v. *Appleton,* 11 Fed. Cas. 1031, No. 6, 324 (C.C.N.Y. 1857). This involved an attempt by an artist to assert a private right of copyright in drawings which he had prepared

as a member of Commodore Perry's expedition to Japan. The drawings were incorporated in the Commodore's report to the Secretary of the Navy, ordered printed by Congress and distributed. The artist later effected registration of copyright in the drawings in his name and then brought suit to enjoin another from reproducing them. The court held that he was neither the author nor the proprietor of the drawings because they belonged to the government pursuant to the understanding of his duties on the basis of which he joined the expedition. The court said "The sketches and drawings were made for the government, to be at their disposal; and Congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public at large, has thereby given them to the public." 11 Fed. Cas. at 1033.

The term "Government publication" is used in 44 U.S.C. § 58 (c. 23, 28 Stat. 601, § 52) and the term "publication of the United States Government" is used in 17 U.S.C. § 8. The first, originating in Section 52 of the Printing Law of 1895, directs the Public Printer, the manager of the Government Printing Office, to sell under Congressional regulation, "additional or duplicate stereotype or electrotype plates from which any Government publication is printed" and provides that "No publication reprinted from such stereotype or electrotype plates and no other government publication shall be copyrighted." The second, 17 U.S.C. § 8, (originally Section 7 of the Copyright Act of 1909, c. 320, 35 Stat. 1075) provides that "No copyright shall subsist in * * * any publication of the United States Government, or any reprint, in whole or in part, thereof: * * *" The terms are not defined in either statute.

Since the enactment of the Printing Law of 1895 and the Copyright Act of 1909, the judicial approach to the question of individual versus government ownership of literary material has not fundamentally changed. In recent years, while legal precedent in the precise area is not abundant, a number of books have been written by officers of the military services, some of which are listed in Exhibit 21 (R. 27, 109-111). Each of them was printed by a private publishing house and copyrighted and their status apparently has not been formally questioned. However, there are three cases which were decided since the Copyright Act of 1909 introduced in its Section 7 the prohibition of the present 17 U.S.C. § 8 against the copyrighting of Government publications. They serve to establish not only those circumstances under which a government official's writings are his own but also those under which the created product is that of the Government.

The first of these is *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286, decided in 1929 in the Supreme Court of the District of Columbia. This was a suit to enjoin alleged infringement of copyright in a book entitled *Military Topography for the Mobile Forces, Including Map Reading, Surveying and Sketching* written by the plaintiff, C. O. Sherrill, while a captain in the United States Army and an instructor at its post-graduate school for officers at Fort Leavenworth, Kansas.

The matters dealt with in the book had been for many years subjects of instruction at Fort Leavenworth. The topics are essentially military and highly technical. There was maintained at the school, at government expense, a printing shop and bookbindery known as the "Leavenworth Press".

While Sherrill was instructing at Leavenworth on the subjects of military sketching, map reading and surveying there was no suitable textbook in the field. He prepared material for such a book in his leisure time for general use and not for the Army only. At the request of authorities at Leavenworth, before his book was printed for general circulation, Sherrill permitted the use at the school of a considerable part of what he had written. A number of copies, sufficient to supply the students at the school, of that part of his work dealing with military sketching, were printed in the form of a pamphlet on the Leavenworth Press. The pamphlet, entitled "Military Sketching", bore the copyright notice, "Copyright 1910, by C. O. Sherrill", and Sherill duly filed his application for registration with the Copyright Office. The bottom of the title page bore the imprint, "The Army Service School Press, Fort Leavenworth, Kansas, March, 1910."

Subsequently, in July of the same year, Sherrill incorporated the pamphlet in his book, the subject of the infringement action, as Part III thereof and copyrighted the book under the title *Military Topography for the Mobile Forces, Including Map Reading, Surveying, and Sketching.*

The defendants claimed that Grieves used no part of Sherrill's "Leavenworth Pamphlet" in the books subsequently written by Grieves and published by the defendants but asserted that even if Grieves had done so such use would have been permissible because, they said, the "Leavenworth Pamphlet" was a "publication of the United States Government" and as such not entitled to copyright under 17 U.S.C. § 7 (now 17 U.S.C. § 8).

In this connection the Court, Mr. Chief Justice McCoy, said

> "* * * The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him." (57 Wash. L. Rep. at 290).

The Court then disposed of the contention made by Grieves' publishers that "the public" had already "paid" for Sherrill's material as follows:

> "This contention is in substance that by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties. * * * The fact is that officers do write such books which are copyrighted and used in Government schools with the approval of the military establishment, and such books are found in the libraries of those establishments. * * *
>
> * * *
>
> "The Leavenworth pamphlet is not a public document. Nor did the publication of it at Fort Leavenworth put it in the 'public domain' * * *". (57 Wash. L. Rep. at 290-91).

At the other end of the spectrum, emphasizing the circumstances under which an employee of the government does not acquire title to his writings, there is the second case, *Sawyer* v. *Crowell Publishing Company*, 142 F.2d 497 (2 Cir.), affirming 46 F. Supp. 471 (S.D.N.Y.), certiorari denied, 323 U.S. 735.

The plaintiff, Ernest Walker Sawyer, was Executive Assistant to the Secreary of the Interior from March 1929 to March 1933. During 1929 Sawyer was sent to Alaska on official business and on his return he directed an employee named Wills in the Division of Surveys, General Land Office, Department of the Interior, to prepare a map in connection with his work in Alaska to accompany a report to the Secretary of the Interior. The map was then printed by the United States Geological Survey and copyrighted by Sawyer in his own name in 1930. In the preparation of the map Mr. Wills, at Sawyer's direction, used:

> "* * * the materials and facilities of the United States government and books, publication and scientific information on file in the Department of the Interior. He received no pay from Mr. Sawyer for his work on the map. The map was prepared as a result of and relating to Mr. Sawyer's work in Alaska in the course of his official duties. * * *" 142 F. 2d at 497.

The map was republished in 1931 by the United States Geological Survey at the direction and expense of a Congressionally-created Highway Commission to which the plaintiff had been appointed. As republished it included certain additional information, eleven red lines and intercity mileage data, and Sawyer's original 1930 copyright notice. No copyright was sought by Sawyer in the additional matter. In the June 1931 edition of a Department of Interior catalog the map was listed as a "Department of Interior Publication Relating to Alaska" under the title "Great Circle Map showing Fairbanks, the Center of Europe, Asia and America, Map No. 8".

The allegedly infringing map published by the defendant, Crowell Publishing Company, was a copy of portions of "Map No. 8". The Circuit Court observed that the district court had ruled as a matter of law,

> "* * * (1) that Map No. 8 is a publication of the United States Government and no copyright subsists therein; (2) that any rights that may exist in the copyrighted map are the property of the United States and, if the plaintiff has a valid copyright, it is held in trust for the United States; * * * " (142 F. 2d at 498).

The judgment was affirmed by the Second Circuit Court of Appeals, Circuit Judge Swan writing:

> "* * * Mr. Sawyer, it is true, testified that he went to Alaska in 1929 to investigate the reindeer situation and that the making of the map had nothing to do with his official duties. But he said also, on cross-examination, that he went 'to make a survey of the facilities that were there under the Department of the Interior.' And Mr. Wills, a disinterested witness, testified that the map was prepared in response to an order from Mr. Sawyer in connection with his work in Alaska and to accompany a report to the Secretary of the Interior. He testified further that Mr. Sawyer told him what he wanted the map for, namely, 'in connection with his work in Alaska to point out the availability of Fairbanks, Alaska, as a logical site for the location of radio stations and aviation fields and for use in connection with his report to the Secretary of the Interior.' Mr. Sawyer was Mr. Wills' superior in authority in the Department of the Interior and their conversation took place in the Department during the usual office hours. These circumstances as well as the manner in which the map was prepared and the fact that Mr. Sawyer paid nothing to Mr. Wills for his work upon it, tend strongly to support an inference that

> when Mr. Sawyer ordered the map he regarded its preparation as part of his official duties. * * *" (142 F. 2d at 498).

Both these cases, *Sherrill* v. *Grieves, supra* and *Sawyer* v. *Crowell,* are sound. In reaching opposite conclusions on their particular fact situations they highlight the difference between a government official's right to own his literary output and not to own it.

The third and most recent case on the subject is *First Trust Co. of St. Paul* v. *Minnesota Historical Society,* 251 F. 2d 686, (8 Cir.), affirming a decision of Judge Nordbye, 146 F. Supp. 652 (D.C. Minn.). Involved was title to the original notes of Captain William Clark of the Lewis and Clark Expedition which were found in a St. Paul attic many years after they were written. The United States intervened in the action to quiet title asserting that the notes were the written records of a government officer executed in the discharge of his official duties and were, therefore, public documents owned by the United States. The data and reports requested of the Expedition by President Jefferson had been prepared and delivered and Judge Nordbye found that the writings in question,—rough notes kept by Captain Clark of his own volition and possibly for private publication,—were private property and did not belong to the Government. The Court of Appeals for the Eighth Circuit adopted the findings of the trial court and affirmed the decision saying

> "* * * the character of the documents themselves, viewed in light of the fact that Captain Lewis, head of the Expedition, was making an official record, lend credence to the trial court's view that they were private as opposed to official records." (251 F. 2d at 691).

None of the foregoing cases reached the Supreme Court but their fundamental approach to the rights of individuals in the employ of the Government is consistent with *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, in which inventors employed by the Bureau of Standards were held to be the owners of their inventions and able to make valid assignments of their patent rights even though they had made fairly substantial use of government facilities.

Judged by the standards of these cases, the writing and delivery of the speeches not having been pursuant to orders or a part of the Admiral's official duties, the speeches on creation belonged to him and not to the government.

2. That the Admiral's speeches drew on his experience in the Navy and were in the best interests of the United States and the Navy did not deprive him of his rights in his material.

The Wash[illegible]n publisher argues that any writing related to or [illegible]ected with official duties is within the scope of offic[illegible]uty and is a Government publication not subject to private copyright. This is error.

Writings which "relate to" or are "connected with" the subject matter of one's employment are not necessarily created "in the course of" performing the duties of the employment relationship. This is especially true in the more intellectual areas where individuals, employed regularly but not employed to write, author countless books, monographs and research papers for their own satisfaction, advancement in their professions and as contributions to knowledge in their fields. As Judge Holtzoff pointed out,

> "* * * Many scientific articles published in technical journals are written by scientists employed

> by private concerns and their employers generally encourage such activities. * * *" (R. 42)

It was said in *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286, 290, quoted at greater length *supra*, p. 31, that

> "* * * The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him."

The Washington publisher relies upon cases involving the acts of federal officials done, as a matter of discretion, pursuant to the performance of their official duties to sustain its views, e.g., *Barr* v. *Matteo*, 360 U.S. 564; *Spalding* v. *Vilas*, 161 U.S. 483; and *United States* v. *MacDaniel*, 7 Peters 1. In these cases the officials were purporting to act in the line of duty and on behalf of the Government. The basic question was whether the individuals could maintain successfully that their acts were done within the scope of their official duties in order to secure various benefits,—immunity in *Barr* v. *Matteo* and *Spalding* v. *Vilas* and reimbursement in *United States* v. *MacDaniel*.

United States v. *Birdsall*, 233 U.S. 223, also improperly relied on by the Washington publisher to sustain the same contention, involved the bribery of Indian Agents in the Department of Interior, whose defense, that the act they promised to perform was outside their official duties, was rejected.

The foregoing cases do not support the proposition that performance of an act which relates in some way to the subject matter of one's employment thereby is

an act done in the course of, or as part of, or pursuant to, the employment. The true tests are what are the understood limits of the employment, the intent of the employee and the nature, time and place of the employee's conduct. The understanding of the employer as to the nature of the employment in this case is shown in Exhibit 24. (R. 27, 111).

B. The incidental use of some Government stationery and secretarial services did not convert private literary material into Government property.

The trial court, after a review of the circumstances under which the speeches were written, held that

> "* * * title to literary property cannot be made to depend on such minor considerations, whether any part of the work was done during office hours, whether a Government secretary participated in getting the manuscript ready, or whether a Government mimeograph or multigraph machine was used in preparing copies. If any Government agency objects to such a course, the matter can be dealt with by regulations or other intramural action, but no such circumstances can deprive the officer or employee of title to property which otherwise belongs to him. * * *" (R. 41)

The Court of Appeals, after reviewing the agreed statement of facts and the findings of the trial court and observing that the writing of these speeches was done at home after normal working hours or while traveling but that the typing of a final copy and the preparation of a multilith master were done by the Admiral's secretary and that the speeches were multilithed on Government duplicating machines as set forth in the agreed facts (R. 49-50), said

> "It would not seem to us that occasional use of a governmental secretary for transcribing or of

multilithing machines for copies for publicizing the speeches would fall under the statutory concept of a publication by or at the cost of the United States." (R. 55, footnote 20)

With respect to the assertion by the Washington publisher that as the speeches "resulted from his official responsibilities" they should be classified as a "publication of the United States Government" under Section 8 of the Copyright Act the Court of Appeals said (R. 53-54)

> "* * * This generalization creates a sea of troublesome questions. Such publications range from the Presidents' messages on the State of the Union, the Congressional Record, departmental pamphlets, maps, regulations, and judicial decisions to forms for the moving of admission to the bars of the various courts. * * * No clarification of the meaning of 'publication of the United States Government' appears in the Rules and Regulations of the Copyright Office.[16] * * *
>
> "The language of the original statute on printing—'No . . . Government publication shall be copyrighted'—seems to refer to a publication actually produced by the Public Printer.[18] * * * The Copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. * * * "

"[16] 37 C.F.R. § 201.1-201.8 (1960).

"[18] See S. Rep. No. 1473, 56th Cong., 1st Sess."

The mere mechanics by which the speeches were processed should have no bearing on the rights in the material itself. As Chief Justice McCoy said in *Sherrill* v. *Grieves*, 57 Wash. L. Rep. 286 at 290-291:

"* * * if the printing of the plaintiff's pamphlet was improper it does not follow that the pamphlet became a government document except in the mere physical sense. * * *"

1. The preparation of some copies in clear and final form was necessary to comply with a Department of Defense Directive and a Navy Department Regulation.

The Department of Defense Directive No. 5230.9, dated August 17, 1957 (Ex. 13, R. 25, R. 99-102), in its Section I prescribes guidelines for the clearance of official speeches, press releases, photographic material and other information originated within the Department of Defense and "a uniform policy and procedure for the review of manuscripts concerning military matters prepared by military personnel and civilian employees, as individuals for publication" (R. 100). Its Section V deals with "Writing for Publication by Defense Personnel, as Individuals" (R. 102) and provides that personnel who write for outside publication not in connection with their official duties shall ascertain that such activity will not interfere with their regularly assigned duties, that such activity shall not be conducted during normal working hours or accomplished with the use of Department of Defense facilities or personnel, that such writers will be on exact parity with outside professional writers with respect to accessibility and use of technical or other information and that "Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security." (R. 102).

The Admiral did comply with the requirements that the material be submitted to the Office of Security Re-

view. Each of the speeches bears a stamp reading "No objection to publication on grounds of military security." (R. 27).

In order to make the required submission to the Office of Security Review and also to comply with the requirement of Paragraph 3 of Navy General Regulation 1252 (Ex. 14, R. 25, 103-4), namely that persons in the naval service whose articles expressing their private opinions on "professional, political or international subjects" are to be published shall forward a complete copy to the Secretary of the Navy for the files of the Navy Department, it was essential that the speeches be multilithed. Therefore, it was no breach of propriety for the Admiral to have used his secretary to prepare the final draft of his speeches, to prepare the multilith masters and to ask to have the speeches run off on the Department's multilith machines. The running of additional copies for distribution by the Admiral to those interested in his subject is a very slight and technical encroachment on the letter of the Department of Defense Directive and the Navy Regulations. The courts below have properly characterized the use of services and facilities as a minor consideration (R. 41) not bringing the speeches under "the statutory concept of a publication by or at the cost of the United States." (R. 55, footnote 20).

2. The form of the press releases and the lack of an express disclaimer of the official nature of the opinions stated in the early speeches did not deprive the Admiral of ownership of the speeches.

The Department of Defense Directive (Ex. 13, R. 99-102) does not provide for disclaimer of official status. However, the Navy Department Regulation, § 1252, ¶ 3, provides that writers of articles published on "professional, political or international subjects

* * * shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large." Such a disclaimer was not used in the early speeches. On each of his speeches since this action was commenced, the Admiral has placed a notice of disclaimer.

This question of the use of a disclaimer, like the question presented by the use of stationery bearing the name of the Atomic Energy Commission or the Navy Department or the Department of Defense, with or without one of the various seals imprinted on the paper as part of the letterhead, is not one of substance.

The appearance of the copies of the speeches might be of some significance if a user of a copy of a speech were thereby misled by the appearance of the speech into a change of position to his detriment or if the Admiral were suing such a user for having taken some of the material. In such a case the user might well argue that his use had been made under the impression that the material was a Government publication. This is not the case here. The Washington publisher who brought this declaratory judgment action asked the Admiral for permission to use the speeches. The Washington publisher did not assume that they were Government publications; he merely argues that they ought to be Government publications.

At most what is involved is failure to observe a departmental regulation and as Judge Holtzoff said (R. 41):

> "* * * If any Government agency objects to such a course, the matter can be dealt with by regulations

> or other intramural action, but no such circumstances can deprive the officer or employee of title to property which otherwise belongs to him. * * * "

The Government asserts no rights in the speeches as it did in *First Trust Co. of St. Paul* v. *Minnesota Historical Society*, 251 F.2d 686 (8 Cir.). This lack of interest was not due to lack of knowledge of the existence of the controversy. Significance was attached to this by the trial court which said:

> "* * * In this instance, although the Court caused the United States Attorney to be notified of the pendency of this proceeding, and extended an opportunity to Government counsel to appear as *amicus curiae*, the Government did not avail itself of this invitation. Manifestly, it is a fair inference that the Government does not feel that it has any interest in the proceedings and that it does not desire to assert any paramount title, or to claim that the literary product here involved is in the public domain." (R. 41)

The stationery and the seal are mere externals which do not go to the substance of the ownership of the literary material embodied in the speeches.

The important thing is that the Admiral's speeches are not listed in the United States Government Publications Monthly Catalog from 1955 to date.

IV. SOUND PUBLIC POLICY REQUIRES THAT FREEDOM OF EXPRESSION BY GOVERNMENT OFFICIALS BE ENCOURAGED

It is not in the public interest to hamper intellectual growth or to interfere with the development of ideas. If by entering government employment individuals were to sell all their energies, physical and mental, and commit themselves to deliver all their writings to the government insofar as they related in any way to sub-

ject matter dealt with by them in performing their duties, a faceless and anonymous group of conformists would be bred, deprived in substantial part of individual character, freedom and incentive. The total output of new thought would be reduced and each thinker would be at the mercy of his superiors in rank with respect to the circulation and publication of his writings.

As long as security is not violated, as long as illegal conduct such as interfering with elections is avoided, to permit individual thoughts and recommendations to be expressed is far better than to run the risk of bottling them up under a system of administrative review.

A. Departmental directives and regulations recognize that military personnel and civilian employees may write as individuals.

It is the policy of the Department of Defense and the Department of the Navy to encourage personnel, both military and civilian, to write for outside publication. Department of Defense Directive No. 5230.9, dated August 17, 1957, titled "Clearance of Department of Defense Public Information" (Ex. 13, R. 25, 99-103), provides, in Paragraph V, as follows:

> "V. WRITING FOR PUBLICATION BY DEFENSE PERSONNEL, AS INDIVIDUALS
>
> Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers

> with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security."

This permits outside writings on any subject without regard to whether the subject "relates to" or is "connected with" the writer's work as long as the writing is not in connection with official duties. The permission is subject only to the normal restriction that the writing activity will not interfere with regularly assigned duties or violate military security and that the Defense personnel shall be on no better basis than outside professional writers as concerns access to information.

This policy of encouragement is also formally expressed in the Navy General Regulations, Section 1252.3 (Ex. 14, R. 25, 103-4) which permits persons in the naval service to publish articles on "professional, political, or international subjects". Paragraph 5 of the same Regulation (Ex. 14, R. 104) provides that: "Subject to the requirements and restrictions of this article, persons in the naval service are at liberty to publish articles without further permission from higher authority."

The only "requirements and restrictions" to be found in the article (Ex. 14) are that the writer's signature appear, together with a statement that the opinions or assertions contained in the writing are the private ones of the writer, and that upon acceptance of an article for publication, complete copies shall be forwarded to the Secretary of the Navy for the Department's files.

Far from indicating that such writings may not relate to the writer's duties, the regulation expressly provides for the writing of articles on "professional" subjects which must be deemed to include the writer's own profession.

Similarly, the policy to encourage writing is formally expressed in Article 0514 of the U. S. Navy Public Information Manual (Navexos P-1035). This article is titled "Writing for Publication" and in part reads as follows:

> "1. General Policy.
>
> "(a) Within the bounds of security and Department of the Navy policy, the writing of articles, books, scripts, speeches and similar material intended for publication on topics of military and professional interest, or general interest concerning the Navy, or in support of the military policy of the United States, or in the interest of the national defense is desirable and so authorized. * * * ".

The writings here in question are quite in accord with the policy of the military establishment to encourage the writing for publication of even those articles which "relate to" or are "connected with" the official duties of the author. It is clear that when a person in the military does so, not pursuant to direction, such writings are not considered by the Navy Department to be a part of "official duties" and hence are not government publications. (Ex. 24, R. 27, 111).

In the field of atomic reactors there has been a substantial distribution of information and this is known to the Washington publisher. In *Constraint by Copyright*, by M. B. Schnapper, copyrighted by Public

Affairs Press, Washington, D. C., 1960, are listed, on pages 58, 60, 63 and 64, a number of books published between 1952 and 1959 on nuclear power reactor design, research, development and related problems. The nature and size of this list indicate that the information on the subject was made widely available in organized and authoritative form. Although much of this material was copyrighted the information and ideas embodied in it were, and now are, available and usable.

The only possible objection to this type of dissemination of information is that raised by a publisher who merely wants to copy free of charge, and to sell for whatever the traffic will bear, material produced by others.

B. The Admiral's writings have added to the sum of human knowledge.

The Admiral's speeches had a profound effect on public thinking in the field of education. The first eleven of them antedated Sputnik. If the Admiral had not stirred himself and made the speeches, the public and the press would have had that much less to talk about. Far from restraining the circulation of information the speeches promoted it.

None of the speeches revealed classified information and the data incorporated in certain of the speeches were freely available in book and other form. It is well known that the Admiral has taken the initiative over the years in having the problems and the progress of the atomic reactor programs published.

In the course of hearings before subcommittees of the Joint Committee on Atomic Energy, "Naval Reactor Program and Shippingport Project", 85th Congress, 1st Session, March 7 and April 12, 1957, released

in June 1957, the Admiral furnished for the record (pp. 45-51) a list of the information on new techniques, materials and equipment development which had already been released to the public as unclassified for the use of American industry and the public. These items included a number of handbooks and manuals, some of which are dated as early as June 1950.

In *Liquid Metals Handbook, 1 June 1950*, published by the Government Printing Office, among the acknowledgments is the following, (p. v):

> "Captain H. G. Rickover, USN, of the AEC, who made the original suggestion of this handbook to the committee has lent support and encouragement to the handbook project throughout its development. * * *"

In the report of hearings before the Joint Committee on Atomic Energy, 86th Congress, 1st Session, April 11 and 15, 1959, there is incorporated as Appendix 2 (pp. 59-71) a comprehensive early history of the pressurized water reactor (PWR) at Shippingport. Also attached as Appendix 3 (pp. 71-81 with particular reference to the technical papers and books listed on pp. 79-81) is a summary of technical benefits derived from the naval reactor and Shippingport programs. These hearings were held a month before the Admiral's Shippingport speech of May 28, 1959 (Ex. 12, R. 20, 98-9).

In addition, there have been on the bookshelves for some time the following with respect to Shippingport:

> The "Shippingport Pressurized Water Reactor" written by personnel of Naval Reactors Branch, United States Atomic Energy Commission and Westinghouse and Duquesne Light and Power, 1958, published by Addison-Wesley Publishing Company, September 1958.

Bettis Technical Review, April 1959, "One Year of Operating Experience at Shippingport"—Westinghouse (WAPD-BT-12), available at the Office of Technical Services, Department of Commerce, Washington 25, D. C.

1. The press was specifically authorized to use the material but even if there had been no invitation the press could have used the speeches as news.

Each of the first three speeches of the Admiral's to bear a copyright notice, namely those of December 11, 1958 (Ex. 9), February 17, 1959 (Ex. 10) and March 16, 1959 (Ex. 11), bore beneath the notice a legend as follows:

> "No permission needed for contemporaneous press use."

In subsequent speeches this legend was made more specific by referring to "newspaper and news periodical use" instead of "press use" and the word "contemporaneous" was omitted in order to avoid giving the impression that there was some time limit on such use. This change was effected as a result of a suggestion from a member of the journalistic fraternity, Ex. 7, and is elaborated upon in Ex. 8 (Ex. 7, R. 91-2; Ex. 8, R. 93-4). The nature of the press release itself and the legend in either form clearly indicate the Admiral's intention to have the material used to the extent deemed desirable by any newspaper or news periodical. However, theoretically such permission might be withdrawn. In that event the press could still have made use of any of the speeches, whether copyrighted under the statute or not, quite apart from the general doctrine of "fair use" because the "news" element, the information concerning current events contained in a literary production, is not the subject of copyright. *International News Service* v. *Associated Press*, 248

U.S. 215; *Chicago Record-Herald Co.* v. *Tribune Association*, 275 Fed. 797 (7 Cir.); *Morse* v. *Fields*, 127 F. Supp. 63 (S.D.N.Y.); *Davis* v. *Bowes*, 209 Fed. 53 (S.D.N.Y.). Insofar as the restraint of new information is concerned, if what was contained in the Admiral's speech was not new, no harm is done and if it were new, it would be "news" and the press would be able to copy it without question under the line of cases just cited.

2. Any writer or publisher is free to use the speeches fairly under the copyright doctrine of "fair use".

Even writers and publishers not in the newspaper business would be entitled, under the doctrine of fair use as it has been established in copyright law, to quote portions of the speeches. Whether a use is fair or not depends upon all of the circumstances surrounding the use. *Benny* v. *Loew's, Incorporated*, 239 F. 2d 532 (9 Cir.), affirmed, 356 U.S. 43.

The extent and relative value of the copyrighted material taken, the purpose for which it is taken and the effect of the distribution on the owner of the original work must all be taken into consideration. The subject has been well summarized by Judge Yankwich in *What is Fair Use?*, 22 U. of Chi. L. Rev. 201 (1954):

> "If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, regardless of quantity, is fair. If, on the other hand, the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair." (208, 9)

Judge Story said in *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4,901,

> "* * * no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. * * *" (344).

The ideas which are embodied in a copyrighted work as distinguished from the form of expression itself are not subject to copyright and therefore the information, as distinguished from the form in which the information is expressed by the original writer, may be circulated. *American Visuals Corp.* v. *Holland*, 219 F.2d 223 (2 Cir.); *Funkhouser* v. *Loew's, Inc.*, 208 F.2d 185 (8 Cir.). There is, therefore, nothing in copyright which tends to bottle up information and ideas. The only barrier is that to slothful or mechanical copying without permission. This is particularly true when, as here, the claimant to the right to copy wishes to enrich himself by the free use of the material produced by another.

Far from restricting the flow of information, the Admiral, by writing and delivering his speeches, has contributed to it. There is unavoidably presented the question of balancing the equities and this is summed up completely by Judge Washington in his dissent (R. 64) with respect to the question of dedication of the early speeches:

> "The plaintiff-appellant comes to the courts without having contributed one iota to the work it seeks to appropriate. It has not even gathered and compiled the (fol. 67) speeches—on the contrary, it seeks to force Admiral Rickover to collect and present to it copies of all of them. This is a litigation which in its every aspect deserves to fail."

C. The Admiral's rights of ownership in his speeches are consistent with the constitutional rights of freedom of speech and freedom of the press.

The Admiral's rights of ownership of his copyrights, like the guarantee of freedom of speech and freedom of the press, have their origin in the Constitution. The purpose behind Clause 8 of Article I, Section 8 of the Constitution, which empowers Congress to grant patents and copyrights, is to encourage individual effort in order to advance the public welfare through the maximum use of the talents of authors and inventors in science and the useful arts. *Mazer* v. *Stein*, 347 U.S. 201. The power to prescribe the conditions on which an author shall enjoy exclusive rights in his writings has been exercised by Congress in the enactment of the Copyright Law. *Wheaton* v. *Peters*, 8 Peters 591.

The Washington publisher contends that unless Admiral Rickover's speeches are cast into the public domain, its constitutional rights are violated because of the First Amendment's provision that Congress shall make no law abridging freedom of the press. This must mean that if Admiral Rickover's speeches are not government publications and are therefore subject to the protection of the Copyright Act the Copyright Act is unconstitutional, an absurdity in view of Article I, Section 8, Clause 8 of the Constitution.

In crying Freedom of the Press the Washington publisher has raised a straw man. The object of the First Amendment is to prevent restraint by the Government, in whatever form that might take, on the free and general discussion of public matters. *Grosjean* v. *American Press Company*, 297 U.S. 233; *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697. This case cannot even remotely be said to raise a question of "restraint" within the meaning of the First Amendment. There is no attempt here by the government to muzzle the Wash-

ington publisher in the free exercise of a right to criticize, comment, or discuss, or to print anything it desires to print. It is a question of the ownership rights of a particular author in his literary creations, and nothing more, which is at issue here. It is this question of *ownership* which would have to be answered in favor of the Washington publisher before there could possibly arise any question of freedom of the press.

The Washington publisher maintains that it is a "trustee" of "the people's right to know" and as such it is entitled to an untrammeled "freedom of access" to acquire materials it may desire to publish. This is equivalent to insisting that it obtain its source material free of charge,—that it is entitled to pirate Admiral Rickover's speeches. The First Amendment does not confer upon publishers, whether they be book publishers or newspaper publishers, any constitutional right of access to information not available to others. *Tribune Review Publishing Company* v. *Thomas*, 254 F. 2d 883 (3 Cir.); *Trimble* v. *Johnston*, 173 F. Supp. 651 (D.C. D.C.); *United Press Association* v. *Valente*, 308 N.Y. 71, 123 N.E. 2d 777; *New York Post Corporation* v. *Moses*, 23 Misc. 2d 826, 204 N.Y.S. 2d 44.

In the *Tribune Review* case, the court, rejecting the same false issue sought to be raised here, observed that the case did not deal with freedom of expression at all but had to do simply with gaining access to information on matters of public interest, the taking of photographs in a court room:

> "* * * this question of getting at what one wants to know, whether to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the First and Fourteenth Amendments of the Constitution. * * *" 254 F. 2d at 885.

In *Mabee* v. *White Plains Publishing Co., Inc.*, 327 U.S. 178, this Court answered a contention that the Fair Labor Standards Act of 1938, 52 Stat. 1069, "lays a direct burden on the press in violation of the First Amendment" by saying, "As the press has business aspects it has no special immunity from laws applicable to business in general." 327 U.S. at 184, citing *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103.

The First Amendment and a federal copyright statute have existed side by side for almost one hundred seventy years without a hint of conflict being raised between the two on constitutional grounds.

Professor Chafee, in *Free Speech in the United States*, (4th Ptg., 1948), pp. 572-4, listed nineteen federal statutes affecting freedom of speech. The Copyright Act is not among them.

The issue of "freedom of the press" has no relevance to this case and the Washington publisher's rights to material it desires to publish are no greater in the premises simply because it happens to have access to printing presses. Its plea is not for a "free press" but for free material for its presses.

V. THE FINDINGS OF FACT SHOULD NOT BE DISTURBED.

Factual findings concurred in by two lower courts will usually be accepted by the Court unless clear error is shown. However, on some occasions the Court finds it necessary to consider the facts to determine for itself whether the proper legal tests have been applied by the lower courts to the facts. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377.

In *Graver Tank & Manufacturing Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, on rehearing, 339 U.S. 605 this Court said (336 U.S. at 275):

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. * * *"

In the instant case the unanimous findings of fact as to the non-governmental nature of the Admiral's speeches should be followed because they are so precise and definite and so clearly not erroneous.

CONCLUSION

It is respectfully requested that this Court:

(a) affirm the unanimous decision of the Court of Appeals that the speeches as they were created belonged to the Admiral and not to the Government, and

(b) reverse the decision of the Court of Appeals that the speeches distributed without notice of copyright were dedicated to the public domain.

Respectfully submitted,

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September 15, 1961

APPENDIX

APPENDIX A

United States Court of Appeals
For the
District of Columbia Circuit
FILED Jan. 17, 1961
/s/ JOSEPH W. STEWART
Clerk

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

District Court Civil Action No. 116-59

No. 15,463

PUBLIC AFFAIRS ASSOCIATES, INC., *Appellant*,

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Appellee*.

Before: Mr. Justice Reed, sitting by designation, and Washington and Danaher, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's motion to recall and modify the judgment entered herein October 20, 1960, and of appellant's opposition, it is

ORDERED by the court that the judgment of October 20, 1960, shall be recalled from the District Court and amended by substituting in place of the last paragraph of the order the following:

"It is FURTHER ORDERED by the court that each party shall bear its own costs on this appeal."

It is FURTHER ORDERED by the court that the judgment, as modified, shall be forthwith transmitted to the District Court.

Per Curiam.

Dated: January 17, 1961

APPENDIX B

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States,
Article I, Section 8, Clause 8.

The Congress shall have Power * * *;

* * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * *

Amendment [I]

Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

Copyright Act of 1790
§ 1 and § 6, c. 15, 1 Stat. 124

SECTION 1. * * * That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, * * * and any other person or persons, being a citizen or citizens of these United States, or residents therein, * * * who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: * * * And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors,

administrators or assigns, for the further term of fourteen years: * * *

SEC. 6. *And be it further enacted*, That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.

17 U.S.C. § 2. Rights of author or proprietor of unpublished work

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material

No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided*, That copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publications authorized by section 1 of the Act of January 27, 1938 (39 U.S.C. 371).

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor. July 30, 1947, ch. 391, § 1, 61 Stat. 652; Oct. 31, 1951, c. 655, § 16(b), 65 Stat. 716.

17 U. S. C. § 10. Publication of work with notice

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 12. Works not reproduced for sale

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; * * * But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale. July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 13. Deposit of copies after publication; action or proceeding for infringement

After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of

Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, * * * As amended, Mar. 29, 1956, c. 109, 70 Stat. 63.

17 U.S.C. § 24. Duration; renewal and extension

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, * * * July 30, 1947, c. 391, § 1, 61 Stat. 652.

17 U.S.C. § 26. Terms defined

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire. July 30, 1947, c. 391, § 1, 61 Stat. 652.

44 U.S.C. § 58. (Printing Law of 1895, § 52)
Sale of duplicate plates; copyright

* * * No publication reprinted from such stereotype or electrotype plates [from which any Government publication is printed] and no other Government publication shall be copyrighted. (Jan. 12, 1895, c. 23, § 52, 28 Stat. 608.)

Navy Department General Regulations,
Article 1252, Par. 3

3. Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signatures to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for pub-

lication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department.

37 C.F.R. § 202.6 Lectures or similar productions prepared for oral delivery (Class C)

This class includes the scripts of unpublished works prepared in the first instance for oral delivery, such as lectures, sermons, addresses, monologs, panel discussions, and variety programs prepared for radio or television. The script submitted for registration in Class C should consist of the actual text of the work to be presented orally. Formats, outlines, brochures, synopses, or general descriptions of radio and television programs are not registrable in unpublished form. When published with notice as prescribed by law, such works may be considered for registration as "books" in Class A.

ADMINISTRATIVE ORDERS

Department of Defense Directive No. 5230.9, August 17, 1957

I. PURPOSE

This directive prescribes guidelines for the clearance of official speeches, press releases, photographic material and other information originated within the Department of Defense or any of its agencies for public release. It also prescribes a uniform policy and procedure for the review of manuscripts concerning military matters prepared by military personnel and civilian employees, as individuals for publication.

V. WRITING FOR PUBLICATION BY DEFENSE PERSONNEL, AS INDIVIDUALS

Personnel of the Department of Defense, military and civilian, who write for outside publication not in connection with their official duties on any subject or in any form shall

ascertain that such activity will not interfere or conflict in any way with their regularly assigned duties. Such activity will not be conducted during normal working hours, or accomplished with the use of Department of Defense facilities, or personnel. Such writers will be on an exact parity with outside professional writers with respect to accessibility and use of technical or other information for manuscripts or articles written for publication. Articles by such personnel, dealing with military matters, will be submitted to the Office of Security Review, OASD(PA), for review and clearance to avoid any possible violation of military security.

U. S. NAVY PUBLIC INFORMATION MANUAL.
Navexos P-1035. Article 0514.
Writing for Publication

1. General Policy.

(*a*) Within the bounds of security and Department of the Navy policy, the writing of articles, books, scripts, speeches and similar material intended for publication on topics of military and professional interest, or general interest concerning the Navy, or in support of the military policy of the United States, or in the interest of the national defense is desirable and so authorized.

(*b*) Commanders will provide full cooperation, compatible with military security, to persons requesting information and/or assistance in the preparation of material for publication as specified in article 0514.1 (*a*), above.

(*c*) Military personnel and civilian employees of the Naval Establishment are authorized to write for publication subject to provisions of this section and provided that:

(1) Such activity does not interfere or conflict in any way with regularly assigned duties.

(2) Such activities [sic] not conducted during normal duty hours.

(*d*) Commanders should encourage military personnel and civilian employees to write for publication. However, personnel engaged in writing for publication for personal profit are on an exact parity with civilian professional writers not in the employ of the Navy as far as accessibility to classified current technical or operational military information is concerned. This policy applies to military personnel on active duty, retired persons, and members of the civilian components.

(*e*) Military and civilian personnel may receive pay for private literary effort; however, they may not receive pay or other remuneration for the preparation of material which their duties require them to provide gratuitously. This policy applies to any official Navy material, including photographs, authorized for public release.

(*f*) The inclusion of classified information in any article, book or related material prepared for public dissemination by military or civilian members of the Naval Establishment is prohibited. The policy of security at the source applies and in all cases the final responsibility for material intended for publication rests upon the individual preparing and/or releasing such material.

(*g*) As provided by Navy Regulations, article 1252.3—"Persons in the naval service desiring to publish articles on professional, political, or international subjects in accordance with the provisions of this regulation shall cause their signature to appear on such articles, together with a statement to the effect that the opinions or assertions contained therein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large. Immediately upon the acceptance of such articles for publication, the writer shall forward a complete copy of such articles to the Secretary of the Navy for the files of the Navy Department."

(h) Articles dealing with military matters, written by personnel on active duty or employed in the Naval Establishment, will be submitted to the Office of Information for review and clearance to avoid any possible violation of military security.

(i) Subject to the requirements above, persons in the Naval Establishment are at liberty to publish articles for personal profit without further permission from higher authority.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

No. 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

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OPINION BELOW

The opinion of the court of appeals (R. 47) is reported at 284 F.2d 262.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1960 (R.65), and was modified on January 17, 1961 to provide that each party bear its own costs on appeal.[1]

The petition for a writ of certiorari was filed on January 14, 1961, and the cross-petition for a writ of certiorari filed on February 17, 1961. Both petitions were granted on March 20, 1961, and the cases consolidated 365 U.S. 841 (R.67). The jurisdiction of the Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where a high-ranking and policy-forming Federal official makes public statements or speeches directly related to or connected with his official duties (which are delivered while he is on official duty and are multilithed by Government personnel on Government facilities and on Government time), are copies of such public statements or speeches "Government publication[s]" under the Printing Law or "publication[s] of the United States Government" under the Copyright Law, and therefore not subject to copyright, under the following circumstances:

a) If they are issued and publicized by his employing Government agencies as official Government press releases on official Government letterhead, and distributed through official Government channels by Government personnel, without any disclaimer whatsoever (either by the official or the Government) of their official character?

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[1] Conditional Cross Petition for a Writ of Certiorari, No. 739, Oct. Term 1960, p. 17.

b) If they are issued as press releases without Government imprimatur?

2. Does Freedom of Press, under the First Amendment, protect the press and the American public from arbitrary limitation of access to such public statements or speeches through private copyright monopoly over press releases of such statements or speeches?

3. Are such public statements or speeches dedicated to the public domain if, prior to copyright, multilithed copies are widely distributed to the press, to individuals upon request and unsolicited to other individuals, to the public sponsor of the occasion at which the speech is delivered in large batches "to be made available to the press and others", and in other public places unrelated to the location or sponsorship of the speech, with no indication whatsoever of limitation or restriction upon the use of such press releases?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Copyright Law, 17 U.S.C. 8, provides: "No copyright shall subsist in the original text of any work which is in the public domain, . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof: . . ." This provision of law dates from 1909, 35 Stat. 1075, §7.

2. The Printing Law, 44 U.S.C. 58, provides in part that ". . . No publication reprinted from such stereotype or electrotype plates ['from which any Government publication is printed'] and no other Government publication shall be copyrighted." This provision of law dates from 1895, 28 Stat. 608, §52.

3. The First Amendment to the Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The facts are as follows:

1. Petitioner [2] is an educational publisher, located in Washington, D. C.; it specializes in pamphlets and books on national affairs.

2. Respondent is a Vice Admiral, one of the 26 top officials in the entire United States Navy. During the pertinent period he was on active duty in the Navy Department as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and also served simultaneously as Assistant Director for Naval Reactors, Division of Reactor Development, U.S. Atomic Energy Commission (R.6). He has had a major role in achievement of America's first atomic submarine, the *Nautilus*, as well as the nation's first commercial atomic power plant at Shippingport, Pennsylvania.

3. Between October 20, 1955 and January 15, 1959, the date of commencement of this action, Respondent publicly delivered 23 speeches (R.6) on matters connected with or directly related to his official duties. The titles of these speeches appear at R.105; some of them are as follows:

"Metallurgy in Atomic Power"
"Nuclear Power and the Navy"
"Lead Time and Military Strength"
"Nuclear Power—Challenge to Industry"
"The Challenge of Nuclear Power"
"The Naval Revolution"
"The Meaning of the Nautilus' Polar Voyage"

Subsequent speeches included "The Shippingport Atomic Power Station: Lessons From Its Operation."

(a) The texts of the first 22 of Respondent's speeches were officially published by the United States Government (R.10); 13 of them were formally issued by the U.S. Department of Defense as official Government press releases on Defense De-

[2] The terms "Petitioner" and "Respondent" will be used in this brief to designate the parties in No. 36, except when otherwise stated.

partment letterheads (*e.g.*, R.70, and p. 49 of Petition for Writ of Certiorari), and others were officially issued by the Atomic Energy Commission on A.E.C. letterheads (*e.g.*, R.69, and p. 50 of Petition).

(b) Each such Government press release described Respondent in his official capacity, generally with all of his official titles.

(c) Such official press releases of Respondent's speeches carried official notice of a specified official telephone number where Government information officers were to be available to discuss and provide further official information on Respondent's speeches and their contents (*e.g.*, R.69, 74, 79, 81, 84, 89).

(d) At the time of the issuance and distribution of the first 22 press releases, none among the first 22 speeches contained any copyright notice and no written or oral restriction of any kind whatsoever was placed upon their use or upon their publication, in whole or in part, nor was there any indication of any kind whatsoever that they were not the official documents which on their face they purported to be or that they were not to be construed as official.

(e) Respondent made no application for copyright registration on any of these first 22 speeches until December 1, 1958, *after* all of them had been delivered and the official press release on each of them had been publicly distributed (except for Numbers 7 and 12) by the issuing Government agency (R.7). When furnished to the Copyright Office copies of these 22 speeches were identical with the original official press releases in all respects but one: they did not reveal their original Government *imprimatur* as described above. Respondent did not disclose to the Copyright Office the fact that these first 22 speeches had originally been issued and circulated to the public as official Government press releases.[3]

---

[3] As an example of Respondent's practice of non-disclosure, compare the form of Speech No. 8, "The Challenge of Nuclear Power", issued as an official Defense Department press release at the time of delivery (R.74) with the form of the very same speech concealing this fact, as

(f) The 23rd speech bore a copyright notice prior to distribution. Respondent's copyright registration showed that the document was prepared by a person admitted to be Respondent's official Government secretary (R.7, 25).

4. The speeches were distributed, except for Numbers 7 and 12 (R.8), in the following manner:

(a) Multilithed or processed copies of the first 22 speeches were officially distributed by the Public Information Offices of the Department of Defense or of the Atomic Energy Commission, through official Government press channels, as official Government press releases (R.8, 14);

(b) All the press releases were, in addition, distributed by the Respondent:

i.) Approximately 50 copies were furnished to the sponsor of each speech "to be made available to the press *and others* at the place where the speech was to be delivered" (R.8, emphasis added);

ii.) Mailed "to individuals who had requested copies or who [sic] Admiral Rickover believed would be interested in the subject" (R.8); and

iii.) At the National Press Club in Washington, D. C., for the use of the press or such other persons as there sought or found them, although none of the speeches was delivered at that location (R.8).

5. The original draft of each speech was prepared by Respondent, and the final draft typed by Respondent's Government secretary in his Government office. All of the first 22 speeches were multilithed by Government employees during their regular office hours, using Government duplicating machines and on Government press release letterheads (R.8, 25, 48).

6. The General Regulations of the United States Navy, Article 1252 ¶3, require that all non-official publications by all persons in the Naval Service shall bear "a statement to the effect that the opinions or assertions contained therein are the

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submitted for copyright registration (R.77). For a photocopy of actual original press releases, see Petition for Writ of Certiorari, No. 649, Oct. Term 1960, pp. 49-50.

private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large" (R.103).

7. Respondent admits that he did not make such disclaimer in any of the 23 speeches (R.10). The Trial Court found that "some of them dealt with ideas that the Admiral developed in connection with his activities as a Naval officer", 177 F.Supp. 601, 602.

8. Department of Defense Directive No. 5230.9 provides for the "official release" through "press release" of "defense information originated by the Department of Defense" (§IV). This Directive does not authorize issuance of official Government press release of writings prepared by Defense Department officials in their private capacity (§V) (R.101-102).

9. On or about October 29, 1958, the Petitioner asked Respondent for copies of two of these speeches in order to quote from them. Thereafter, but prior to December 1, 1958, Respondent adjured the Petitioner not to quote from such speeches (R.6).

10. At all times when Respondent delivered the speeches herein involved, he was on official duty and had not taken leave of any kind for personal purposes, either for traveling to the location of the speech or for the time during which the speech was delivered. In every case Respondent's travel to the location of the speech was paid for by the United States Government as official travel (R.9).

11. When honoraria were offered to Respondent for some of the speeches, he requested that they be paid to a specific charity. In no case did he accept for himself payment for his speeches (R.9).

12. No question is involved of secrecy or control of information for reasons of national security or because of executive privilege.

SUMMARY OF ARGUMENT

This case involves an attempt by a Vice Admiral of the United States Navy to copyright copies of 23 speeches delivered

publicly while on official duty, on subjects connected with or directly related to his official duty. Twenty-two of these speeches were issued as official Government press releases, either by the Department of Defense or the Atomic Energy Commission, and widely and generally distributed to the press and others with no indication of any nature whatsoever disclaiming official character or limiting the use of such official press releases. The official Government press releases of these speeches were in all respects like other Government press releases: they purported to be official Government documents making public matters which were of official concern to the issuing Government agency. Of the 23 speeches, the first 22 bore no copyright notice at the time of their original issuance and distribution as official Government press releases.

The Printing Law and the Copyright Law both forbid copyright of any "Government publication". The question before this Court is whether the press releases of the speeches in question, made by a high-level, policy-forming Government official while on official duty concerning Government affairs entrusted to him within the scope of his official duties, were "Government publications" which may not be copyrighted, whether or not they were issued as official Government press releases. The Trial Court held that 1) copies of these press releases were not "Government publications", and 2) their issuance and distribution under the circumstances described was not a general publication committing them to the public domain. The Court of Appeals affirmed on the first point but reversed on the second. This Court granted Petitions raising both points for review.

Petitioner respectfully submits that, on the facts of the instant case, the 22 speeches that were issued as official Government press releases are "Government publications" which could not validly be copyrighted, and that the 23rd speech is likewise a "Government publication" because it, like the others, was prepared by a Government official in the course of his official duty.

Statutory Argument

No "Government publication" nor "any publication of the

United States Government" may validly be copyrighted under the Printing Law and the Copyright Law. However, those laws do not define the quoted terms. Therefore, the resolution of the question before the Court depends upon judicial construction of the statutes.

I

Under generally applicable rules of statutory construction, undefined terms are to be read in their "ordinary", "usual" and "normal or customary meaning", as they would appear to "the ordinary man". On the facts of this case, the only "sensible construction" of the terms "Government publication" and "any publication of the United States Government" is that a publication prepared by a Government official which looks like, purports to be, has all the indicia of, and is treated like a "Government publication", and is officially published, issued and distributed by a Government agency as an official Government press release, comes within the meaning of the statutory terms "Government publication" and "publication of the United States Government". Such interpretation that an official Government press release is a "Government publication", has long been accepted by the Superintendent of Documents in his *Monthly Catalog of United States Government Publications*, by the Library of Congress' Division of Documents, by the American Library Association and by experts on Government publications.

II

A publication prepared by a Government official is a "Government publication" when its subject matter comes within the scope of his official duties:

1. Courts of appeal have held under the very copyright statutes here involved that a publication is a "Government publication" when it is prepared by a Government official "in connection with", "as a result of", and "relating to" his official duties.

2. This Court has held in several cases that the proper legal rule for determining if a Federal official acted within the scope

of his official duties is whether the questioned action has "more or less connection with the general matters committed by law to his control or supervision", *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). This Court has specifically rejected the rule of law adopted by the court below that the specific action in question must be "*required* by law or by direction of his superiors". *Barr v. Matteo*, 360 U.S. 564, 575 (1959). The proper test of official duty is the *relation* of the employee's acts to his official duties.

III

The subject matter of Respondent's speeches comes clearly within the scope of his official duties:

1. Ten of Respondent's 23 speeches deal primarily with nuclear energy and naval warfare. His major themes in these 10 speeches are nuclear energy, the industrial aspects of naval vessel construction, and the revolution in sea warfare caused by atomic-powered vessels. These 10 speeches are patently within the scope of Respondent's official duties, bearing in mind his two major official project responsibilities: development of the nuclear submarine (the NAUTILUS, the world's first nuclear submarine), and construction of the first large-scale nuclear power reactor devoted exclusively to producing electricity (the Shippingport Atomic Power Station).

2. Ten other speeches deal with the relation of national defense to education. The speeches themselves, as well as the public record, reveal that for many years, both before, during and after the period here involved, Respondent's official duties directly involved educational matters: appraisal of the effectiveness of existing schools in providing persons competent to do the job assigned to Respondent and his staff, and organization and operation of formal school systems within his employing Government agencies in order better to carry out his official responsibilities.

The Respondent

a) created and operated his own special schools within the Navy, for the education and training of every person assigned to his staff,

b) was instrumental in setting up a similar specialized school for the Atomic Energy Commission, another of his Government employers, and

c) was likewise instrumental in organizing a nuclear engineering school in a leading private university. As the Respondent himself said in one of these speeches: "I have been running schools for years." The educational subjects discussed in these 10 speeches were connected with and directly related to his official duties.

3. The remaining 3 speeches were delivered on the occasion of his acceptance of awards recognizing his outstanding contributions in the fields of his official duties, one such award being accepted by him "on behalf of the Government and the Congress of the United States."

Constitutional Argument

Petitioner publisher's Freedom of Press, protected by the First Amendment, was abridged by the United States Government's registering, and the Respondent's receiving, a copyright monopoly over Respondent Government official's speeches, publicly delivered while on official duty on subjects connected with or directly related to his official duties.

I

Freedom of Press was incorporated in the Bill of Rights as a means of protecting the American people's *right to know*. The Constitution chose the press as the instrumentality to provide a free people with the information necessary to control its government. Freedom of Press was not designed to provide special status for the publishing business but rather to protect the personal right of each American, the press being only a trustee of that right. For this reason, Freedom of Press is constitutionally protected for all publishers, not merely for some.

II

Freedom of access to official Government materials is an indispensable constituent part of Freedom of Press, at least where—as here—no issue of security or executive privilege prevails. Constitutionally-protected Freedom of Press includes not only the publisher's right to print and the distributor's right to circulate, but also the American people's right to read (as a means of achieving its right to know). Freedom of Press must, at the very least, include *freedom of access* to materials officially and publicly released by the Government.

Therefore, Petitioner's constitutional right of Freedom of Press is abridged by a private copyright over publicly-made and officially-released speeches delivered by a Government official while on government duty on matters connected with and directly related to his official duty.

III

The decision below abridges Petitioner's Freedom of Press and sanctions suppression of publicly-released Government information for private purposes. The United States Government failed to prevent its employee from improperly copyrighting "Government publications", and it improperly issued copyright registration to the Respondent for such speeches.

IV

The Constitution is a living and sensitive document that constantly adjusts to "the new circumstances and situations" facing the American people. *Hurtado v. California*, 110 U.S. 516, 530 (1884). The First Amendment protects not only the freedom to print and disseminate information but also the freedom to acquire it. *At the very least, Freedom of Press gives constitutional protection for free access to all officially-released Government publications prepared by Government officials in the course of their official duties.*

Public Domain Argument—
Reply to Respondent's Main Brief in No. 55

The admitted distribution of substantial numbers of multilithed copies of Respondent's speeches, distributed by himself and by the Department of Defense and the Atomic Energy Commission, without any restriction whatsoever as to persons who could receive such copies or the use they could make of them, constituted a general publication which dedicated the speeches to the public domain. The Court below correctly ruled, "That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, 'All claims to copyright waived'," 284 F. 2d at 271 (R.60).

I

The issue before the Court is not whether oral delivery of a speech constitutes publication but rather whether widespread, unrestricted and unlimited distribution of physical copies of the speeches constitutes general publication.

II

The undisputed facts show widespread, unrestricted and unlimited distribution to any and all who sought copies, to others unsolicited by them, and by widespread official press release, and by placement in general public places where they were available to any passer-by. There was no copyright notice at the time of such distribution, and neither written nor oral limitation upon their use or publication or upon their distribution or availability.

III

A general publication occurs when distribution of material is unrestricted *either* as to person or use. If it is distributed without limitation *either* as to persons who may obtain it or as to use which may be made of it, a general publication results.

In this case, there was no restriction whatsoever as to the

nature or number of persons to whom copies could and did go, nor any limitation as to the use anyone could make of the copies. In addition, copies were made openly available at a public place for unrestricted distribution. In short, the facts clearly show that in this case copies of the Respondent's speeches were made available to the public and that a general publication took place.

Petitioner respectfully submits that the decision and judgment of the court below should be

1) *Reversed* in No. 36 insofar as it held that copies of the speeches in question were not "Government publications" and that therefore they were legally subject to valid copyright, and

2) *Affirmed* in No. 55, if it be necessary to reach this issue at all in view of the first holding, insofar as the court below held that the distribution of the speeches was a general publication which dedicated them to the public domain.

ARGUMENT

The question before the Court is the propriety of the private copyrightability of press releases containing speeches delivered by a high-level, policy-forming Government official while on official duty on subjects falling within the scope of his official duty.

Two major legal-policy pressures are at play here: the desirability of encouraging public officials to speak out publicly on matters of public interest; and the protection of the American people's *right to know* what their Government and their Government officials do and say.

Petitioner believes that it is of utmost importance to encourage public officials in speaking or writing what may be in their minds and hearts. But that is not the issue before the Court here. What is here is the proper scope of legal protection to be afforded to public property, in this instance "Government publications". The question in the instant case is the protection of the public character of official statements by Government officials made within the scope of their official duty.

The court below held that the press releases of Respondent's speeches were not "Government publications" and were, there-

fore, susceptible of private copyright. Petitioner respectfully submits that this decision was erroneous and presents two principal arguments in support of its position that the decision of the court below should be reversed on this holding. The first argument is that under the applicable statutes and decisions, as applied to the facts of this case, Respondent's speeches were "Government publications" and, therefore, were subject to the statutory restriction against the copyrighting of "Government publications". The second argument is that under the facts of the instant case, Petitioner's constitutionally-protected Freedom of Press, under the First Amendment, is abridged by Respondent's Governmentally-registered copyright monopoly over access, by the press or the American people, to public statements which he made as a high-level Federal official while on official duty and within the scope of his official duties.

STATUTORY ARGUMENT—The printing and copyright laws forbid copyright of speeches (1) which are issued as official Government press releases or (2) are made within the scope of official governmental duty.

Under the applicable statutes, the ultimate legal issue before the Court in this case is whether Respondent's 23 speeches were legally copyrightable. The dispositive statutory question is whether a copy of each speech was a "Government publication" under the Printing Law, 44 U.S.C. 58, or "any publication of the United States Government" within the meaning of the Copyright Law, 17 U.S.C. 8. If the question is answered in the affirmative, then the speeches were not legally subject to valid copyright.

Neither applicable statute defines the operative terms "Government publication" or "publication of the United States Government". However, in the context of this case, each such term is capable of valid definition on the following two principles:

1. Under generally applicable rules of statutory construction, an official Government press release is a "Government

publication".[4]

2. A publication prepared by a Government official on subjects connected with or directly related to his official duties is a "Government publication" within the meaning of the operative statutes.

At the outset, it should be noted that a Government publication can appear in mimeographed or other processed form and need not be printed,[5] and can be issued by any Government agency and need not emanate from the Government Printing Office.[6]

I. An official Government press release is a "Government publication" and is not copyrightable.

When faced with the problem of statutory construction of an undefined word, this Court has ruled that ". . . Congress will be presumed to have used a word in its usual and well-settled

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[4] The term "Government publication" will be used herein to cover both "Government publication" (Printing Law, 44 U.S.C. 58) and "any publication of the United States Government" (Copyright Law, 17 U.S.C. 8), except where otherwise indicated.

[5] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, April 1940, p. iv; June 1961, p. vi.; SCHMECKEBIER & EASTIN, GOVERNMENT PUBLICATIONS AND THEIR USE 421-23 (Rev. ed. 1961); MERRITT, THE UNITED STATES GOVERNMENT AS PUBLISHER 3-4, 31 (1943); Tisdel, *Processed material and depository libraries*, in AMERICAN LIBRARY ASSOCIATION, PUBLIC DOCUMENTS 38 (1936).

[6] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, June 1961, vi ("The individual issuing department, bureau, office or agency is considered the publisher of Government publications.") A former Assistant Register of Copyrights wrote: "Nice questions may arise as to whether or not a given work is a 'publication of the United States Government' within the meaning of §7 [now, 17 U.S.C. 8]. No case defining these terms comprehensively is found, but they undoubtedly embrace all official documents published at Government expense, as well as the interminable registers, bulletins and circulars of information issued by the various bureaus, agencies, and projects maintained by the Government". HOWELL, THE COPYRIGHT LAW 45 (1952).

sense",[7] in its "commonly accepted import",[8] in its "ordinary", or "usual"[9] usage, its "normal or customary meaning"[10] or in its "popular" import.[11]

For a unanimous Court, Mr. Justice Frankfurter wrote:

> "'Officers' is a word of familiar usage, and '[a]fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.' Addison v. Holly Hill Products Co., 322 U.S. 607, 618 . . ."[12]

Mr. Justice Holmes once said that "there is no canon against using common sense in construing laws as saying what they obviously mean."[13] Elsewhere this Court has sought a "sensible construction" of an undefined statutory term.[14]

"The ordinary man" can accept no other "sensible" meaning than that where a publication

—*looks* like a Government publication

—*purports* to be a Government publication

—is *published* under Government imprimatur

[7] United States v. Stewart, 311 U.S. 60, 63 (1940).

[8] United States v. Wurts, 303 U.S. 414, 417 (1938); III SUTHERLAND, STATUTORY CONSTRUCTION 429-37 (3rd ed. Horack) ("words in a statute are to be given their common meaning").

[9] Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1948); Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 506 (1945); Rosenman v. United States, 323 U.S. 658, 661 (1945); Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922); Danciger v. Cooley, 248 U.S. 319, 326 (1919); United States v. Lombardo, 241 U.S. 73, 76 (1916); Columbia Water Power Co. v. Col. Elec. Street R.L.&P. Co., 172 U.S. 475 (1899).

[10] Old Colony Trust Co. v. Commissioner, 301 U.S. 379, 383 (1937); Avery v. Commissioner, 292 U.S. 210, 214 (1934); De Ganay v. Lederer, 250 U.S. 376, 381 (1919); Caminetti v. United States, 242 U.S. 470, 489 (1917).

[11] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 312 (1956); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951).

[12] Deputy v. DuPont, 308 U.S. 488, 493 (1940).

[13] N.L.R.B. v. Coca-Cola Bottling Co., 350 U.S. 264, 268-69 (1956). *Cf*: Frankfurter, *Some Reflections on the Reading of Statutes*, 46 COL. L. REV. 527, 536 (1947).

—is *issued* and *distributed* by Government agencies

—*comprises* a Government official's speech

—has all the *indicia* of a Government publication, and is

—*treated* by the Government and all who receive it as a Government publication,

it is *in fact* a Government publication.

Just such a sensible construction, that an official Government press release is a "Government publication", has been adopted by the United States Superintendent of Documents (who is charged by law with the duty of issuing a monthly Catalog of United States Government Publications),[16] by the Library of Congress' Division of Documents,[17] by the American Library Association,[18] by leading scholars in the field of Government publications,[19] and apparently also by the Department of Defense itself.[20] Perhaps this Court has already recognized this interpretation, if somewhat tangentially.[21]

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[14] Roschen v. Ward, 279 U.S. 337, 339 (1929).

[15] United States v. Ryan, 284 U.S. 167, 175 (1931). *Cf.* United States v. Shirey, 359 U.S. 255, 261 (1959) ("statutory meaning . . . is more often to be felt than documented").

[16] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, Jan. 1936, p. 3.

[17] CHILDS, GOVERNMENT DOCUMENT BIBLIOGRAPHY (Library of Congress, Division of Documents), p. vii (3rd ed. 1942).

[18] AMERICAN LIBRARY ASSOCIATION, PUBLIC DOCUMENTS AND WORLD WAR II, p. 8 (1942, ed. Wilcox).

[19] SCHMECKEBIER & EASTIN, supra n. 5, at 423; MCCAMY, GOVERNMENT PUBLICATIONS FOR THE CITIZEN 67 (1949); BOYD, UNITED STATES GOVERNMENT PUBLICATIONS 18 (3rd ed. rev. 1949). *Cf.* Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 231 et. seq. (1957).

[20] Dept. of Defense Directive No. 5230.9 ¶¶IV-V, R.101-2. See ¶8 Statement of Case, *supra*, p. 6. See also U. S. Navy PUBLIC INFORMATION MANUAL, Article 0501(4) ("For purposes of Navy Information, a release is defined as any material, written, printed, photographic, or oral, which is disseminated to the public by the Navy through any media.") *Cf.* the Comptroller General's ruling that an article which bore the legend

Petitioner respectfully submits that the only sensible interpretation of the statutory term "Government publication", the only ordinary, usual, normal or customarily accepted meaning that can be given to such words of familiar usage as "Government publication" is that they include the official Government press releases involved in the instant case. It is therefore respectfully urged that the relevant rules of statutory construction stated by this Court, as applied to the undisputed facts of this case, require reversal of the decision of the court below on at least the first 22 speeches which, having been issued as official Government press releases, were "Government publications" within the Printing and Copyright Laws and therefore were not legally subject to copyright.

II. A publication prepared by a Government official on subjects directly related to or connected with his official duties is a "Government publication" which cannot legally be copyrighted.

Petitioner has sought thus far to establish that Respondent's first 22 speeches were "Government publications" by virtue of their having been issued as official Government press releases under the circumstances described.

However, speech No. 23—although issued as a press release (R.8, 38)—was not officially issued as a Government press release, and Numbers 7 and 12 were not released at all. Therefore, it becomes necessary to ascertain the appropriate rule of law for determining when a publication prepared by a Government official is a "Government publication".[22] Petitioner respect-

"Contribution from the Fixed Nitrogen Research Laboratory" became thereby an official, not a private, publication. 7 Comp. Gen. 221 (1927).

[21] In Barr v. Matteo, 360 U.S. 564, 574 (1959), Mr. Justice Harlan said: "The issuance of press releases was standard agency practice, as it has become with many governmental agencies in these times." *Cf.* Mr. Justice Frankfurter's comment from the Bench that "the public relations counsel is part of our American way of life", 29 U.S.L. WEEK 3136 (Dec. 19, 1960).

[22] Notwithstanding his copyright registration, Respondent did *not*

fully submits that the court below adopted an erroneous rule of law, and that the correct rule of law would (in the light of the facts as analyzed in Part III below) demonstrate not only that speech No. 23 is a "Government publication" but would also give independent verification of that some conclusion as to the previous 22 speeches.

According to the court below, to qualify as "Government publication", a work must be "commissioned or printed at the cost and direction of the United States", 284 F.2d at 268, and the material must be "called for by his official duties", 284 F.2d at p. 269. This ruling is unique. All other appellate courts have held that a publication is a "Government publication", and a Government employee's act is within the scope of "official duty", when it is connected with or directly related to a Government employee's official duties.

1. *The copyright cases hold that a publication prepared by a Government official "in connection with" or having "relation to" his official duties is a "Government publication".*

All the leading appellate copyright decisions have applied the rule of law that a publication prepared by a Government official in connection with or directly related to his official duties is a "Government publication". *Sawyer v. Crowell Publishing Co.*[23] dealt with a map of Alaska produced by a Government employee. The District Court stated the following rule of law: ". . . when an employee creates something *in connection with* his duties under his employment, the thing created is the property of the employer . . ." [24]

The District Court analysed the degree of connection under the facts of that case and found that "this relates directly to the subject matter of the Government employee's work", and that

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disclaim any official character or status for the 23rd speech (R.10), as he was required by Navy Regulations to do whenever a speech was to express private views. (Navy Gen. Regulations §1252 ¶3, R.104).

[23] 46 F. Supp. 471 (S.D.N.Y. 1942), aff'd 142 F. 2d 497 (2d Cir. 1944), *cert. denied* 323 U.S. 735 (1944).

[24] 46 F. Supp. at 473 (*emphasis added*).

"The map was prepared as a *result of and relating to* the plaintiff's work in Alask. in the course of his official duties." [25] The Court of Appeals, in affirming the Trial Judge's decision, specifically sustained this doctrine of law.

Another case involving the very same basic issue, *United States v. First Trust Co. of St. Paul*, dealt with Clark's original rough notes for the formal diary of the Lewis and Clark Expedition. The United States claimed that the notes were made in the course of Clark's official duty. The District Court ruled otherwise: "These notes had *no relation to* the affairs of the [Indian] Agency. They were not made *in connection with Clark's conduct of the* [Indian] Agency." [26] And here the Court of Appeals also specifically affirmed the validity of this legal doctrine.[27]

Thus the court below is a minority of one in adopting the view that a publication prepared by a Government official is not a "Government publication" unless it is specifically "called for by his official duties." [28] The court below did not even deem it necessary to distinguish between those speeches which were and those which were not related to or connected with Respondent's official duties,[29] since it specifically rejected degree of connection (between the publication and the Government officer's official duty) as the relevant legal test.[30]

It is universally recognized, as this Court has stated, that ". . . the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails",

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[25] Finding of Fact cited by Court of Appeals, 142 F.2d at 493 (*emphasis added*).

[26] First Trust Co. of St. Paul v. Minn. Historical Society, 146 F. Supp. 652, 653 (D. C. Minn. 1956) (emphasis added).

[27] *Aff'd sub nom.* U.S. v. First Trust Co. of St. Paul, 251 F. 2d 686, 691 (8th Cir. 1958).

[28] 284 F. 2d at 269. See Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, 1960 WASH. U.L.Q. 182.

[29] Gunnels, *op. cit. supra* at 187.

[30] 284 F. 2d at 269 ("It cannot be properly said, as appellant asserted, that a government official who speaks or writes of matters with which he is concerned as an official is by the very fact of being an official barred from copyright on his productions.")

and that broader interpretation must be given to the scope of duties of a "policy-making executive official", *Barr v. Matteo*, 360 U.S. 564, 573, 575 (1959). Thus, the higher the official's status the more unlikely that there will be anything specifically "called for by his official duties", as the rule adopted below requires.

It will be seen, therefore, that unfortunate results develop from the rule adopted below. A person in subordinate position, whose official duties are strictly delineated in terms of expressly designated tasks, is not able to copyright a publication he produced. On the other hand, his superior, in a more responsible and remunerative position, whose high-ranking and policy-forming status normally required his duties to be stated in more general terms, involving the exercise of discretion and initiative, and who by the nature of the circumstances determined his own duties as he went along [31] would be permitted to procure private copyright for precisely the same publication. Fortunately this incongruous result is totally unnecessary under the copyright statute. The rule of the other Courts of Appeals and here urged upon this Court, produces a fair and sensible result, fully consistent with Congressional purpose and public interest, that any employee (whether high or low) whose official duties are related to or connected with a resulting publication is barred from copyright of such publication on the ground that the connection with official duty makes it a "Government publication".

The Navy Department itself has stated that the duties of command officers, whatever else they may involve, also include keeping "the public informed of the activities of the Navy". The *U.S. Navy Public Information Manual* (1953, reprinted 1957) states:

"The First Amendment to the Constitution of the United

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[31] See Respondent's own statement about his responsibilities. "I do not know which hat I am wearing. I understand that I have some job descriptions in the Navy and the AEC, but I have been too busy to read the job descriptions. I only know that I am responsible and that is enough", *Hearings Before Joint Comm. on Atomic Energy*, June 15, 1961, typed transcript, at 213.

States provides for the freedom of speech and of the press . . ." [Article 0507(1)]

"The public has the right to know the manner in which laws are enacted and administered. As an agency of the Federal government, the manner in which the Navy is administered is considered to be within the public domain . . ." [Article 0518(1)]

". . . it is a policy of the Navy and a function of command 'TO KEEP THE PUBLIC INFORMED OF THE ACTIVITIES OF THE NAVY AS COMPATIBLE WITH MILITARY SECURITY'." [Article 0601(1)]

The effect of such official statement of command duties was thus recognized recently: "Similarly, in *Rickover* the Admiral's speeches might well have been considered within the scope of his official duties as a report of a Government officer to interest segments of the public for the execution of his program, or even as carrying out the public relations aspect of his job." [32]

2. *The scope of a Government officer's official duty depends on the relationship or connection between his action and his official duties.*

Whether a publication prepared by a Federal official is a "Government publication" depends on whether its production was within the scope of his official duties. The Register of Copyrights, in a report to the Congress, stated that his office had adopted the following rule [which is consonant with the decisions above quoted]: "Any work produced by a Government employee within the scope of his employment is not copyrightable, even though issued by a private publisher." [33]

This Court has had many occasions, apart from copyright cases, to determine whether and when a Federal official has acted

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[32] Comments, *Copyrights—Right of the Federal Government and Its Employees*, 6 VILL. L. REV. 531, 542 (Summer 1961).

[33] Register of Copyrights, COPYRIGHT LAW REVISION, *A Report on the General Revision of the U. S. Copyright Law*, House Comm. Print, House Comm. on the Judiciary, 87th Cong., 1st Sess., July 1961, p. 131 (hereinafter cited as *Report of Register of Copyrights*).

within the scope of his official duty. The issue arises, for example, when a Federal officer or employee makes a statement, writes a letter, or issues a press release which might be actionably libelous to another party. The typical ruling in such cases is that if the statement is made by a Federal officer in the course of his official duty, he is immune from the otherwise applicable liability for defamation. Thus, the basic legal question in that line of cases is: When is the Government officer or employee acting in his official capacity and within the scope of his official duties? The underlying legal issue in the instant case is identical with the underlying legal issue in the Government libel cases.

In the leading case, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), Mr. Justice Harlan said that the test of official duty was whether it involved "action having more or less connection with the general matters committed by law to his control or supervision".

This Court's latest relevant decision is *Barr v. Matteo*, 360 U.S. 564 (1959), where the question was whether press releases of the Acting Director of the Office of Rent Stabilization were within the scope of his official duties and therefore "privileged" against a suit for libel. In finding that they were, this Court ruled that the guiding test for determining whether a Federal officer's action is within the scope of his official duty is "the relation of the act complained of to 'the matters committed by law to his actual supervision, Spalding v. Vilas, . . .'" (at 573-74).

How close to the predominant nature of such official duties need the Government official's action be? It is sufficient, said this Court, if the action comes "within the outer perimeter of petitioner's line of duty" (575).

The Court's rationale in *Barr v. Matteo* has direct relevance to the invalidity of the doctrine adopted below in the instant case:

> "That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for 'the same considerations which underly the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the con-

cept of duty encompasses the sound exercise of discretionary authority" (at 575).

In a concurring opinion, Mr. Justice Black took special note that "the subject matter discussed in the release was germane to the proper functioning" of the government agency concerned. He continued:

> "It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. See Spalding v. Vilas . . ." (at 577).

In *Barr v. Matteo*, this Court cited with approval two former decisions from other fields unrelated to defamation, in which the underlying issue was the same. *United States v. Birdsall*, 233 U.S. 223 (1914) involved an employee's improper receipt of monies. There Mr. Justice Hughes set forth this Court's criterion of "official action" as follows:

> "To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting . . . Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities . . . In numerous instances, duties not completely defined by written rules are clearly established by practice . . ." (at 230-31).

A similar rule was earlier enunciated in *United States v. MacDaniel*, 7 Pet. 1, 14 (1883), a suit by the Government for recovery on settlement of a Navy official's accounts.[34]

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[34] Similar positions on this same dispositive legal issue have been taken by at least three courts of appeals: Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949), per L. Hand, J., *cert denied* 339 U.S. 949 (1950); U.S. v. Jones, 204 F. 2d 745, 754 (7th Cir. 1953) *cert. denied* 346 U.S. 854 (1953) (not a libel case); Preble v. Johnson, 275 F. 2d 275, 278 (10th Cir. 1960). *Query*, whether the court below was consistent with its own previous decisions on this subject arising in malicious prosecution actions

Thus, it is clear that the rule announced by the Court in *Barr v. Matteo* is of general applicability in determining when action by a Government employee is within the scope of his "official duty".

The position espoused before this Court by the U.S. Government on this very issue of the scope of a Federal employee's official duties is both pertinent and instructive. The Government's Petition for a Writ of Certiorari in *Barr v. Matteo*, stated (at pages 11-12):

> "In *Spalding v. Vilas*, supra, this Court held that, in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that the general legal authority for the act existed—*i.e.*, that the statements have 'more or less connection with the general matters committed by law to his control or supervision', 161 U.S. at 498-9".

The Government's Brief on the merits interpreted the *Spalding Case* as follows:

> ". . . it is not necessary that the official be under a positive legal duty to act; it is sufficient that general legal authority for the act existed . . . So far as official communications are concerned, the doctrine of Spalding v. Vilas has not been limited to heads of executive departments but has been applied to government officials of lesser rank" (at p. 12).
>
> "And in Cooper v. O'Connor, 99 F. 2d 135 (C.A.D.C), certiorari denied, 305 U.S. 643, the court ruled that in order for an act to be within the scope of official duties it was not necessary that it be prescribed by a statute or specifically directed or requested by a superior officer" (at p. 17).

The Solicitor General there claimed, in terms quite apposite to the instant case, that the court below had adopted "an artificially restrictive test of 'line of duty', one which fails to take

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[Cooper v. O'Connor, 99 F. 2d 135, 139 (D. C. Cir. 1938), *cert. denied* 305 U.S. 643 (1938), cited with approval in Hoffman v. Halden, 268 F. 2d 280, 300 (9th Cir. 1959)], as well as in Government defamation [Glass v. Ickes, 117 F. 2d 273 (D. C. Cir. 1940), *cert. denied* 311 U.S. 718 (1941)].

into account the nature of the officer's functions and the circumstances necessitating and justifying his decision . . ." (Brief, p. 16).

Petitioner respectfully submits that the court below adopted an erroneous rule of law governing the test for a "Government publication", and that the correct rule of law—vouchsafed for both by reason and authority—is that a publication is a "Government publication" within the meaning of the applicable provisions of the Printing and the Copyright Laws, when it is prepared by a Federal official or employee acting within the scope of his official duty. Such action within the scope of official duty arises when the publication is connected with or directly related to such official duty.

III. Respondent's speeches at issue were within the scope of his official duty and therefore were "Government publications" not subject to copyright.

The undisputed evidence of record in this case, as well as in the public record, demonstrates that the Respondent's speeches in question were within the scope of his official duty because they were connected with or directly related to his official duties.

It is important to bear in mind the nature of Respondent's official duties and responsibilities. He is a Vice Admiral of the United States Navy, and Assistant Chief of the Navy's Bureau of Ships for Nuclear Propulsion. At the same time, he is Assistant Director of the Naval Reactors Branch of the Division of Reactor Development, United States Atomic Energy Commission.[35] The very fact that he holds two such vitally important positions at the same time is an indication of the importance of his position in terms of Federal nuclear energy developments and naval nuclear power plants.

Among the specific assignments that resulted from Admiral Rickover's very important position, as the Congress itself stated

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[35] Respondent worked under the budgets of both the Department of Navy and the AEC. *Hearings House Approp. Subcom., 86th Cong., 2nd Sess., Public Works Appro. for 1961*, AEC, Part 3, p. 227.

in awarding him a special medal,[36] were the development and construction of

1. the world's first nuclear powered ship, in particular the world's first nuclear powered submarine, the *Nautilus*, and

2. the first large-scale nuclear power reactor devoted exclusively to the production of electricity, the Shippingport Atomic Power Station.

It is generally recognized that the Respondent is the father of the nuclear submarine[37] and of the Shippingport reactor.[38] For these accomplishments, and for his other many important contributions to the welfare and security of the nation, Petitioner joins millions of other American citizens in paying respect to the Respondent.

1. *These speeches deal with subjects connected with or directly related to Respondent's official duty.*

What did Respondent himself say on this crucial issue?[39] Of the 23 speeches in question, 10 deal primarily with atomic power and naval warfare, 10 others primarily with the relation of national defense to education, and 3 with occasions involving Respondent's receipt of an award.

A. *Speeches Dealing with Atomic Energy and Naval Warfare.*

(i) Ten of the 23 speeches deal with nuclear energy, the industrial aspects of nuclear energy as applied to naval vessels and their construction, and the technical revolution wrought by nuclear energy in naval warfare. A few examples will illustrate the point. The first speech, "Metallurgy in Atomic Power", is devoted from the outset to "major problems in the use of metals

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[36] P.L. 85-826, August 28, 1958.

[37] Senator Jackson, member of Joint Committee on Atomic Energy, 104 CONG. REC. 16915 (Aug. 11, 1958).

[38] *Id.* at 18108 (Aug. 18, 1958).

[39] The Trial Court found that "some of them [Respondent's speeches] dealt with ideas that the Admiral developed in connection with his activities as a Naval officer", 177 F. Supp. at 602. See also Pilpel, *But Can You Do That?*, PUBLISHERS' WEEKLY, Dec. 26, 1960, p. 31. ("The speeches dealt with subject matter with which the Admiral was officially concerned. . . .")

in the application of atomic energy to the propulsion of ships" (R.69) and to Respondent's asking his audience, The National Metals Congress of the American Society for Metals, for help to "solve them [such problems]" (R.69). The speech's fourth paragraph reads:

> "Although I will discuss primarily the problems associated with naval plants, I am sure you will recognize that what I say applies with equal force to nuclear power plants for central stations, such as the one we are building at Shippingport, Pennsylvania."

Thus, the Respondent himself states that this first speech is directly related to his two main official responsibilities, nuclear vessels and central nuclear power plants.

(ii) The theme of the second speech, "Nuclear Power and the Navy" (which was substantially the same textually as the 5th speech, R.105), is "the impact of nuclear power on the Navy", and "two of the basic principles of waging Naval warfare" (R.71). In this speech Admiral Rickover describes at considerable length "the advantages of nuclear propulsion" to naval warfare (as exemplified by his own project, the NAUTILUS, America's first nuclear submarine), the history of the development of the NAUTILUS and of the intergovernmental relations which made its development possible, the Navy's plans for future nuclear submarines and surface vessels, and the plans of the Atomic Energy Commission in developing a group of nuclear power plants for the Navy.

Respondent's own words, in the last two sentences of this second speech, bespeak its close connection with his official duties: "However, it is impossible for one who has been so closely connected with nuclear power, and for so long a time as I have been, to achieve a completely detached viewpoint. So, it is only fair to mention that my remarks may have been colored by the favorable light one tends to cast on his own work."

It is important to note that it was in the context of this second speech that the following comments on education were made by Respondent:

"In our work, as in every venture, trained people are essential. In the early days, and over the protests of my leading people who did not want to interrupt their work, I sent many of them and also our new young people away for advanced technical training in nuclear engineering. At the time it seemed the wrong thing to do because of the extremely heavy work load. But we knew that we had to develop many technically qualified people if we were to become an effective organization. Similar educational steps had to be taken by our contractors. Those of us who remained behind had to carry the burdens of the ones who went away to learn, but we became the stronger for it. The benefits from this technical training convinced me that it should be continued. As a result, nearly everyone who has joined us since the beginning, in 1948, has been sent away for additional training" (R.72).

We shall return at a later point to consideration of those of Respondent's speeches which deal with the relation of national defense to education, but in that context it is important to note that Respondent himself here regards his educational activities as part of his own work.

(iii) Respondent's 8th speech, "The Challenge of Nuclear Power", exhorts industry to help in the technical and industrial aspects of his official job:

"Just as the strength of a chain is no greater than that of its weakest link, so does the successful operation of a nuclear power plant depend on the reliability of all its parts — not alone the nuclear reactor, but also the heat exchangers, pumps, valves, etc. In fact, our experience with the four operating plants of the Naval Reactors Program has shown that it is these components which have proved less reliable than the nuclear reactor itself. Also, . . . their delivery time is poor . . . Here, I believe, is . . . a challenge to industry" (R.75).

The 7th speech, "Nuclear Power—Challenge to Industry", was in the same vein.

(iv) The 14th speech, "Revolution at Sea", had as its theme: "Today our Navy is in the midst of another change—conversion

from oil to nuclear power . . . Let me give you a brief timetable" (R.82). The 11th speech was substantially the same in theme and in much of its contents (R.79). Both the 11th and 14th speeches dealt with the conversion of the Navy to nuclear energy and with the resulting effect on the future of naval warfare. The same theme, the changing nature of naval warfare, appeared in the 20th speech, "The Meaning of the Nautilus' Polar Voyage" (R.89).

(v) While it was not one of the first 23 speeches, another of Respondent's speeches introduced into the record dealt with his central nuclear power plant duties: "The Shippingport Atomic Power Station: Lessons From Its Operation" (R.98).

(vi) One needs no more than Respondent's own words, from the very speeches under consideration, to realize that the 10 speeches devoted primarily to nuclear energy and naval vessels or naval warfare, and derived from information uniquely available to him because of his official position,[10] were unquestionably within the scope of Respondent's official duties as the Navy's No. 1 man for the development of the nuclear submarine who also simultaneously served as Assistant Director of the Naval Reactors Branch of the Atomic Energy Commission. Therefore, quite independently of the fact that they were all issued as official Government press releases, copies of such speeches were "Government publications" within the meaning of the Printing and Copyright Laws and were not legally subject to copyright.

B. *Speeches Dealing With the Relation of National Defense to Education.*

Nine other of the first 22 speeches dealt primarily with educa-

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[10] "In *Rickover*, much of the information which formed the nucleus of Rickover's speeches, such as those concerning atomic energy, and submarines, was acquired in his position as an Admiral", *op. cit. supra* note 32, at 542. *Cf*: President Kennedy's statement opposing the practice of Government employees "using for private gain official information which is not available to the public", Message to Congress, "Ethical Conduct in Government", H. Doc. No. 145, 87th Cong., 1st Sess., p. 7 (April 27, 1961).

tional subjects. While *ab initio* perhaps some of them could have been regarded as not connected with or directly related to Respondent's official duties, this issue is foreclosed by their issuance (with Respondent's approval) as official Government press releases. As has already been indicated, Petitioner's position is that this fact alone, under the circumstances disclosed in this case, is conclusive upon their being "Government publications."

However, the 23rd speech, which also dealt with education, was not released as an official Government press release. Therefore, the test of "official duty" is critical in determining whether this 23rd speech was a "Government publication".

The 23rd speech was entitled "Education: Our First Line of National Defense". Therein Admiral Rickover said:

> "Though I have never taken a course in 'education', *I have been running schools for years.* Everyone in my atomic power group has taken a hand at some time or other at teaching what he has first had to teach himself about the new science of engineering. *We have set up schools for our own engineers and for industrial people, as well as for the officers and men who will operate our nuclear ships. In our post-graduate program we teach the exacting requirements of reactor design, construction and management.*" (R. 96). (Emphasis added throughout in connection with this speech.)

Admiral Rickover is a distinguished engineer employed by the U.S. Government. His educational concerns, he says, come out of this fact:

> "As any engineer would, I noticed many years ago that Russia, with her tremendous new educational program . . . was gaining momentum at a time when we were losing momentum. This shows up in the constant lengthening of lead time in this country . . . As an engineer, engaged in pushing through a new engineering project, it has long been obvious to me that we cannot shorten lead times . . . unless we find ways to remove the many roadblocks . . . Nearly all those roadblocks are caused by people whose education has not prepared them for the extremely difficult problems which arise when we

seek to progress beyond present levels of technology . . . " (R. 96-97).

What did the Respondent, as a government official "engaged in pushing through a new engineering project", think took up his time and energy on the job?

> "*It is no exaggeration to say that a major part of our time has been taken up with fighting for higher levels of performance which are resisted because their necessity is not understood . . . Resistance comes from . . . an inflexibility which has its roots in an educational system that does not prepare young people for life in our constantly changing world*" (R. 97).

Admiral Rickover makes it crystal-clear that he is talking about *difficulties confronting him in recruiting his own official staff for his own official assignments*:

> "I have interviewed more than two thousand young men in the last twelve years, all top men in their college class.[41] My naval reactor engineering group presently numbers about 150. Since the men who came to see me had already passed through a number of previous interviews where all but the best were eliminated, it is evident that those who could not meet the requirements of the nuclear power project—and hence inferentially of any new development project—vastly outnumbered those who qualified."
>
> "This experience made a deep impression on me. *It led me directly to a study of why our educational system produces so few men who are qualified to do the work we must do if we are to progress.* I found that our schools are the greatest 'cultural lag' we have today" (R. 98).

Your Petitioner does not wish to be misunderstood in this connection. Respondent is to be commended for his broad vision of the responsibilities placed upon him by the enormously

[41] This theme recurs in several of the "educational" speeches, e.g., the 5th (R.105). See also Respondent's testimony as to same practice with Naval Academy students, *Hearings before the Subcom. of the House Com. on Appro.*, 87th Cong., 1st Sess., Part 3, "Public Works Appropriations for 1962", 1518.

important tasks committed "to his control or supervision". But he cannot have it both ways. If while performing his official duties education is part of his job,[42] then he cannot elsewhere validly contend that education is solely an avocational interest. The 23rd speech is, therefore, clearly within the scope of duty commited to Respondent's "control or supervision."

No useful purpose would be served by extended quotations from all of Respondent's so-called "educational" speeches. However, it is well to note the remarks and circumstances in connection with the 15th speech, "Education in the Nuclear Age". This speech was delivered, as the Atomic Energy Commission's Press Release states on its face, "on the Occasion of the Dedication of Nuclear Power Training School", located at the U.S. Naval Base at New London, Conn. (R. 84), a school which Respondent created, as will be described below. Perhaps nothing else shows so much the inextricably interrelated nature of education to Respondent's official duties. Here is what the Navy's No. 1 nuclear power expert said in delivering the dedicatory address to the nuclear power training school he had created:

> "It may well be asked: why need we select this group of men from among many and send them to a special school not open to the rest of their colleagues? The answer is simple: we have no choice.
>
> "We have no choice but to develop a new kind of navy man to run a new kind of naval ship. The school provides the kind of education needed by the officers and men of a nuclear navy" (R. 85).

And the relation of all this, in his own work, to the broader educational themes on which he sometimes expounded, is stated by Admiral Rickover thus:

> "Once the American public realizes the desperate con-

[42] Counsel for Respondent said before the Trial Court: "The Admiral's interest in the subject of education . . . was stimulated by his experience in the Navy. In recruiting scientific personnel for his work on nuclear propulsion no one can say that he is not interested in improving the Naval Service . . ." (R.29)

sequences of our great shortage of trained man power in terms of national well-being in a resources-poor future, and of our very existence as an independent and strong nation; once the connection is made in everyone's mind between education and lack of vitally needed scientists and engineers—there will I hope be action to undo the educational harm of the past half century. But we in the Navy cannot wait for this to happen. For we dare not fail our responsibility always to have ships and men at their maximum technological potential, so that we may be able to protect the freedom and liberty of our country in any war, hot or cold" (R. 87-88).

As Respondent himself earlier told the Congress:

"I was forced into the educational problem because I saw the poor products of our educational system. That is what got me started. I am a customer for the products of our schools. I tried to get people to help me do a job in nuclear power development, and I found the product of our schools quite unsatisfactory, so I set out to find the reasons."[43]

Lest there be any thought that the 23rd, the last, of the Respondent's speeches here involved indicated a new scope of his official duty which was not present at the time of the earlier speeches, it is well to note the following excerpt from Respondent's testimony before a House Appropriations Subcommittee on June 27, 1956:

"*We run quite a number of schools of our own because there is a great shortage of scientists and engineers*, and we found we could not depend too much on schools and on available training programs. We found we had to train our own people in order to get ahead. Had we depended on the state of education or training of the new people who entered our program, we could never have done our job. *We are running at the present time a number of different schools within the naval program. These schools range from the one at the submarine base at New London, Conn., for teaching nuclear*

[43] "Report on Russia by Vice Admiral H. G. Rickover, USN", *Hearings Before the Comm. on Appro., House*, 86th Cong., 1st Sess., p. 2 (August 18, 1959), hereinafter cited as "*Rickover Report*".

theory to officers and enlisted men, to others which teach physics and nuclear design to scientists and engineers. We are training engineers and we are training scientists. That is a constant thing that goes on all the time." [44]

The Congress itself has confirmed Respondent's own judgment that education was part of his official job in working with nuclear submarines. The Chairman of the Joint Committee on Atomic Energy stated:

"The committee continues to be impressed with the careful attention Admiral Rickover devotes to the selection and training of personnel who operate naval nuclear propulsion plants and those who are technically involved in reviewing their design, construction, and operation. We strongly urge that there be no relaxation of Admiral Rickover's practice of insisting on personnel of exceptionally high mental capacity and dedication." [45]

(1) Respondent's Official Educational Duties

The above-cited quotations from Respondent's own speeches indicate his own clear assertion that education is an integral part of his official Government job. This is true in very specific ways, not merely in a general rhetorical sense.

a. Naval Nuclear Propulsion Training Program

Respondent created his own official school within the Department of the Navy,[46] in order to enable him to do his official job.

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[44] *Hearings Before House Appro. Subcom., Second Supplemental Appropriation Bill 1957*, Part 2, "Investigation of Atomic Electric Power", p. 141-42 (emphasis added).

[45] *Hearings Before the Jt. Com. on Atomic Energy*, "Naval Reactor Program and Polaris Missile System", 86th Cong., 2d Sess., p. VI (April 9, 1960). To same effect, see Chairman of House Appropriations Subcom., *Hearings Before House Approp. Com.*, 87th Cong., 1st Sess, "Public Works Appropriations for 1962", Part 3, p. 1528-29.

[46] *Cf*: ". . . to create a large and unique educational operation of one's own (which Rickover has done in the schools of the Naval Reactor Program, now enrolling nearly 2,000 students) . . .", Koerner, *Movers and Shapers of Education—Admiral Rickover: Gadfly*, SATURDAY REVIEW, April 15, 1961, 62. See also Preface to RICKOVER, EDUCATION AND FREEDOM (1959), quoted below.

This school's official *Catalog of Information*[47] opens with a quotation from Respondent on the "naval revolution", taken from the 14th speech.[48] It points out that Admiral Rickover's education program has two separate school campuses, one the Nuclear Power Department of the U.S. Naval Submarine School at New London, Conn., established in 1956, and the other established two years later as the U.S. Naval Nuclear Power School at Mare Island, California (p. 5). The catalog also shows that other special training and educational programs were established in this field as far back as 1950 and that other training units were set up in various places about the country. The curriculum contains a "considerable amount of course material analagous to college courses" (p. 10), and requires a year for completion (p. 8) on the basis of 8 hours a day for 5 days a week (p. 15).

b. Other educational activities in the Navy and the Atomic Energy Commission.

Still other specific educational activities have been part of Admiral Rickover's official duties. Here again, we let Respondent speak for himself:

> "I was instrumental in setting up the Oak Ridge School of Reactor Technology. I also assisted in setting up the first nuclear engineering course at the Massachusetts Institute of Technology and I am presently on an advisory committee to Princeton University to help them revise their mechanical engineering curriculum."[49]

According to its official publication, the Oak Ridge School of Reactor Technology offers a full 9 month academic program open to engineers or persons of equivalent background, at a

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[47] The Naval Nuclear Reactor Propulsion Training Program—*Catalog of Information*, published in 1960 by the U. S. Government Printing Office.

[48] P. 4 (this is a quotation from the speech "Revolution at Sea", R.32, 5th paragraph).

[49] Testimony is response to a congressional question asking Respondent "to state your qualifications for talking about education". *Rickover Report, supra*, p. 2.

tuition fee of $2,000 per year. In its first seven years of operation, this school graduated "over 700 engineers and scientists".[50]

Another example of the essential connection of education to Admiral Rickover's duties is his schedule during an official visit accompanying the Vice President of the United States to the Soviet Union and Poland.[51] According to his testimony before the House Appropriation Committee, his three major activities on this official visit were as follows: 1) inspection of the Soviet nuclear ice-breaker, 2) inspection of a central electric power station,[52] and 3) conferences with the Soviet and Polish Ministers of Education,[53] visits at Moscow University and other educational institutions in Soviet Russia[54] and in Poland,[55] and a talk with Soviet Premier Krushchev on education.[56] All of this was done during, and as part of, an official trip, in the course of his official duty and was reported to the Congress as "my duty to do it".[57]

Nor is it inappropriate to note that the Atomic Energy Commission, of which Admiral Rickover is a distinguished and high ranking staff officer, has extensive educational programs in educational institutions throughout the nation, and makes extensive and substantial financial grants to colleges, graduate students and teachers for the purchase of equipment, the operation of schools, the training of teachers, fellowships, and the development of pedagogical tools such as training materials and laboratory manuals).[58] In a speech before the National Science Teachers Association, AEC's Chairman Seaborg stated:

> "The AEC has assisted in the development of more than 400 seminars, workshops, institutes and lecture programs all over the country. Usually, they have been sponsored by

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[50] Oak Ridge National Laboratory, Oak Ridge School of Reactor Technology 1-4 (1961).

[51] U.S. News and World Report, Aug. 10, 1959, p. 19.

[52] *Rickover Report, supra*, 36.

[53] *Id.* p. 2.

[54] *Id.* p. 25.

[55] *Id.* p. 27.

[56] *Id.* p. 26.

[57] *Id.* p. 31.

[58] AEC, Annual Report for 1959 (1960), pp. 600, 142-3.

teacher training schools, state boards of education or local school districts. The attendance has been principally high school and elementary school science teachers.

"The Commission produced two handbooks for use by high school teachers in conducting radioisotope experiments. The nuclear exhibits programs, which includes high school demonstration units, have drawn a cumulative attendance of more than 35 million persons.

"In cooperation with the Oak Ridge Institute of Nuclear Studies, the Commission has trained selected science teachers and sent them out for two weeks' stay at schools to help improve the quality of science teaching at the secondary school level . . . "[59]

Similarly, a large variety of educational programs has been extensively conducted and sponsored by the Navy Department.[60]

(2) *The Public Record*

Admiral Rickover himself asserts that education was and is part of his official duties. There is independent evidence, of public record, to prove this fact. Witness, for example, Respondent's book, EDUCATION AND FREEDOM, published in 1959,[61] which is on file with the Court as Exhibit 19 below. In the Foreword to this book, Edward R. Murrow, now Director of the United States Information Agency, wrote: "Admiral Rickover is no theoretical pedagogue. His attitude toward American education was the result of practical experience . . . " (p. 6)

[59] AEC Press Release No. S-3-61, for release March 28, 1961.

[60] See, e.g., Secretary of Defense, Annual Report, July 1, 1958 to June 30, 1959, p. 236; Dept. of Navy Approp. 1958, *Hearing, House Approp. Subcom.*, 85th Cong., 1st Sess., p. 336 *et seq* ; *Dept. of Defense Approp. for 1961, Hearings, id.*, 86th Cong., 2nd Sess., Part 3, pp. 463, 515. In addition, 13.5% of all of the Navy's Research and Development obligations for fiscal year 1961, and 10.5% of all of AEC's were to educational institutions, *Senate Committee on Gov. Operation*, Sen. Rep. No. 263, 87th Cong., 1st Sess., "Coordination of Information, Current Scientific Research & Development Supported by the U. S. Govt.", p. 33 (May 13, 1961).

[61] The instant case raises no issue, and Petitioner has made no claim, concerning the validity of copyrighting this book.

And in a preface to the same book, Mr. Charles Van Doren, then of Columbia University, said:

> "The first reaction of many Americans to Admiral Rickover's temerity will be to ask what right he has, since he is not a professional educator, to write of education . . . It is of course not quite fair to imply that Admiral Rickover is an amateur. Among other things, his book discusses the educational program the author has integrated in the course of designing and building the first atomic ships, and the first central station atomic power plant at Shippingport, Pennsylvania. The men who must make and man them, the Admiral discovered, could not be prepared for the task by any existing educational system; he therefore invented a system." (p. 8)

The professional nature of Respondent's educational activities is attested, for example, by United States Senator William Proxmire, who said: "It has been said that Admiral Rickover may be a great Navy man—but he has no real experience as an educator. This simply is not true. The Admiral has not only had substantial experience, he has had eminent success as a professional educator."[62]

Another public recognition of the Respondent as a professional educator appears in the Educational Section of TIME for May 12, 1961 (pp 63A-B):

> "For his salty criticism of U.S. schools, Admiral Hyman G. Rickover is often dismissed by professional educators as an out-of-his-depth amateur. *In fact, Rickover is a seasoned schoolmaster running one of the most efficient school systems in the U.S.*: the Navy's little-known Nuclear Power Schools at New London, Conn., and Mare Island, Calif.
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> "Rickover lauched them in 1956 and 1958 because he considered the products of U.S. schools illiterate in science and unfit for nuclear sailing. In his own 24-week schools, which already have 2,000 alumni, Rickover hurls college courses at enlisted men and graduate courses at officers, with an in-

[62] *Congressional Record* (Daily Edition), May 12, 1961, p. A3326.

tensity that is probably unmatched anywhere else."

The TIME article continues with the following description of the curriculum in Respondent's own schools and of his own personalized role in the actual instructional and pedagogic process:

"The curriculum is a fat-free diet of pure math, physics, chemistry, electronics, engineering and health physics (to guard against radiation) that goes on for seven 50-minute periods a day, plus an average of four hours of homework done in a tiny, distraction-free cell. Teachers are on duty for help around the clock, and RICKOVER himself often *conducts a final oral exam.*

"Last month 500 more students entered the schools after rigorous selection and anguished boning up on calculus. *Rickover personally screens every officer who enters, grills every enlisted man who flunks to find out why. He checks the courses and picks the teachers,* many of them former college professors now happily authorized to toss erasers at window gazers—if any." (emphasis added)

That Respondent's official school is more than a trade school appears from the following:

"Just to make sure the studying takes, Rickover requires requalification tests aboard ship. A man has to study to keep his rating, study harder to get ahead. This produces an odd personnel problem: a steady drain on savvy chief petty officers as they get commissions. Compared with the Navy as a whole, 30 times more Rickover sailors become officers. "You lose 20% of your people," growled one sub commander last week as he stared at a couple of CPOs hunched over books as well as black coffee. That fails to daunt "the admiral," as he is called without further identification. Says Rickover: "*The main thing is that the men have been taught to think. It just shows what we can do with all our youngsters if we try.*" (emphasis added)

c. Speeches on Acceptance of Awards.

The remaining three speeches were delivered by Respondent in connection with his acceptance of awards made to him in

recognition of his outstanding contributions in the field of nuclear power and naval developments.[63] We shall cite from only one of these speeches, No. 12, that delivered in Italy on the occasion of the bestowal of the International Communication Award for 1957. There Respondent said: "I am highly honored to have been chosen for this year's 'Christopher Columbus' Award which I gratefully accept on behalf of the Government and the Congress of the United States" (R. 80).

What more positive or persuasive proof could one want that education was directly related to and connected with Respondent's official duties than his own speeches and the official record attesting that as he saw it the efficient performance of his official job required him continuously to study the effectiveness of the existing educational system in providing the knowledge and skills he deemed necessary for his own staff, that his job required him to create various schools within the Navy and A.E.C., and that because of his job "I have been running schools for years"?

Petitioner respectfully submits that on the basis of the connection with and the relationship of the subject matter of the 23rd speech with Respondent's official duties, that speech is within the scope of his official duties. Therefore, although it was not issued as a Government press release prior to its delivery, the release copy of the 23rd speech was a "Government publication" not subject to valid copyright.

CONSTITUTIONAL ARGUMENT — Respondent's securing of copyright monopoly over speeches made publicly within the scope of his official duty is a denial of freedom of press under the first amendment.

At the end of the last term, the Court said: "Federal statutes are to be so constructed as to avoid serious doubt of their constitutionality".[64]

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[63] See, for example, comment of Senator Anderson, 104 Cong. Rec. 16983 (Aug. 11, 1958).

[64] International Association of Machinists v. Street, 367 U.S. 740, 749 (1961). See also Dennis v. United States, 341 U.S. 494, 501 (1952); Communist Party v. Catherwood, 367 U.S. 389, 392 (1961).

Elsewhere the Court has "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same".[65]

Petitioner respectfully submits that, in order to avoid an unconstitutional result as applied to the facts of this case, the proper application of the First Amendment's provision protecting Freedom of Press requires interpreting the statutory terms "Government publication" and "any publication of the United States Government" to encompass Respondent's 23 speeches issued in multilithed or processed form.

Petitioner submits this Constitutional Argument for two purposes:

1) to confirm the Statutory Argument as to the proper construction of the operative statutory terms under the facts of this case, and

2) in the event that such Statutory Argument fails of persuasion, to demonstrate that the United States Government's action in issuing, and the Respondent's action in receiving, copyright registration on his official speeches abridges Petitioner publisher's Freedom of Press under the First Amendment.

Even where it has not been necessary to reach constitutional issues to decide a case before it, the Court has specifically expressed its view on the constitutional questions which would have been present "if reached by the court."[66] On occasion the Court has deliberately decided to reach the constitutional issue, although the case could have been decided on other grounds, because it was necessary to solve such constitutional issue in order to avoid future difficulties.[67]

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[65] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). See also United States v. Rumely, 345 U.S. 41, 45 (1953) and cases therein cited.

[66] Peters v. Hobby, 349 U.S. 331 (1955); Kent v. Dulles, 357 U.S. 116, 129-130 (1958). *Semble*, Rice v. Sioux City Cemetery, 349 U.S. 70, 72 (1955). See also Volanski v. United States, 246 F. 2d 842, 845 (6th Cir. 1957), per Stewart, C. J.

During the last term the Court indicated that it will delve into certain areas, albeit rarely, "not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights".[68]

In this connection, the Court's attention is respectfully called to the system of substantial evasion of the law which is described in the Petition for a Writ of Certiorari in No. 649, October Term, 1961, pp. 18-22 and the related appendices.[69]

The constitutional questions in this case are twofold:

1. Does the First Amendment's guaranty of Freedom of Press permit a high-ranking, policy-forming Government official to receive, and the United States Copyright Office to issue, copyright registration on speeches which were delivered while he was on official duty and on subjects connected with and directly related to his official duties?

2. Does the First Amendment permit the United States Government to acquiesce in a Federal employee's receipt of a private copyright on a "Government publication", thus authorizing a private monopoly over officially released Government material against the press and the American people?

I. Freedom of press protects the American people's *Right To Know* what their Government officials do and say.

1. *The people's right to know is the raison d'etre of a free press.*

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[67] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). *Cf*: United States v. U.S. Gypsum Co., 333 U.S. 364, 387 (1948) ("While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent.")

[68] Scales v. U.S.A., 367 U.S. 203, 230 (1961).

[69] As recently as last June, the House Committee on Appropriations expressed grave concern about "subterfuge" employed by the Department of Defense and other agencies in using non-profit private corporations to avoid statutory restrictions. House Report No. 574, 87th Cong., 1st Sess. (June 23, 1961), p. 53.

The American people's rights are at stake here, although they do not appear as party to the suit. The Bill of Rights exemplified a clear rationale for Freedom of Press: 1) that a free society cannot survive without full knowledge of its Government's activities, and 2) that a free press was the only instrumentality for protecting the American people's *right to know*.

This Court has long recognized that a free press is essential for a free people. In *Associated Press v. United States*, 326 US 1, 20 (1945), Mr. Justice Black wrote for the Court: "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

Mr. Justice Frankfurter said in the same case that "the business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them," and that the basic function which a Constitutionally guaranteed free press serves in our nation "is to have the flow of news not trammelled." (p. 28, 29).

Cooley saw freedom of press in the same light: "The evils to be prevented (by the First Amendment) were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[70]

2. *The right to know is essential for a free people's capacity to control its government.*

The founders of our nation saw in a free press the means of enabling a free people to remain free by maintaining public accountability of its Government and Government officials. James Madison was chairman of the committee that drafted the First Amendment and presumably knew its purpose.[71] He wrote: "The right of freely examining public characters and measures,

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[70] 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

[71] PATTERSON, FREE SPEECH AND A FREE PRESS 121 (1939).

and of free communication thereon, is the only effectual guardian of every other right . . . "[72]

Throughout our national history this concept of the press as an instrumentality of the American people for the control of its government has been pervasive in judicial readings of the First Amendment. In *Grosjean v. American Press Company*, 297 U.S. 233, 250 (1936), Mr. Justice Sutherland wrote in connection with a claim of abridgement of freedom of press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information . . . Since informed public opinion is the most potent of all restraints upon mis-government, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *United States v. Rumely*, 345 U.S. 41, 56 (1953) Mr. Justice Douglas (concurring) said: "The aim of the historic struggle for a free press was 'to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government' . . . That is the tradition behind the First Amendment . . . "

And in *Roth v. United States*, 354 U.S. 476, 484 (1957), Mr. Justice Brennan recognized this same objective as the motivation for constitutional protection of Freedom of Press:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
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> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the ad-

[72] 6 WRITINGS OF JAMES MADISON 398 (1906 ed.). *Cf.* "Nothing is more vital in government than the freest possible flow of information", Pierre Salinger, White House Press Secretary, N.Y. Times, March 21, 1961, p. 27, col. 4.

vancement of truth . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' 1 Journals of the Continental Congress 108 (1774)."

3. *Freedom of Press is a right of the American people; the press is a trustee of that right.*

Freedom of Press was not designed as a special privilege for the publishing business, but rather as an extension of the personal rights of each American. It is a guaranty of the individual's rights, and was thus joined in the Bill of Rights with the rights of free speech, assembly and petition.

This Court has characterized "the freedom of speech and that of press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." [73]

It has been judicially recognized that "The doctrine of freedom of the press is not for the benefit of the press but for the benefit of the people. Newspaper publishers, therefore, have a high degree of responsibility to preserve the doctrine of freedom of the press for the benefit of the people, not for their own benefit." [74]

"Free press" is only a shorthand way of saying that the press must be free because of the right of all Americans to be informed. Arthur Hays Sulzburger of the *New York Times* addressed the Trustees of the New York Public Library on this issue:

"Perhaps we ought to ask ourselves now just what freedom of the press really is . . . Freedom of press—or, to be more precise, the *benefit* of freedom of the press—belongs to every-

[73] Schneider v. State, 308 U.S. 147, 161 (1939).

[74] United States v. Powell, 171 F. Supp. 202, 205 (N.D. Calif. S.D. 1959), per Goodman, Ch. J.

one, to the citizen as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community than is accorded to other citizens. He enjoys an explicitly defined independence because it is the only condition under which he can fully perform his role, which is to inform fully, fairly and comprehensively. The crux is *not* the publisher's freedom to print; it is rather the citizen's right to know! What I would point out is that freedom of the press is your right as citizens and not mine as a publisher." [75]

Col. Robert R. McCormick of the *Chicago Tribune* said: "The freedom of the press is the freedom of the American people." [76]

The Editor-in-Chief of the *Waterbury (Conn.) Republican American*, E. R. Stevenson, wrote: "Let us consider what freedom of the press is. It is really something that belongs to all the people and is not the treasured possession of a privileged class known as Editors . . . It is the one instrument of the American people through which they can protect their freedom. . . . Freedom of the press belongs to you, the people, and is of utmost importance to you in maintenance of your freedom. Fight for it against the government if need be; fight for it against any newspaper, if need be." [77]

Elisha Hanson, distinguished counsel for the American Newspaper Publishers Association, put it thus:

"The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in printed form. Publishers are but trustees of this right. Thus the press not only has the obligation to gather and disseminate information of general public interest, but it has the greater obligation—that of preserving the right of the people to have a press free from restraint in the performance

[75] Nov. 13, 1956. Privately printed, p. 9. (Available at New York Public Library, 42nd Street Branch, New York City.)

[76] McCormick, THE CASE FOR FREEDOM OF THE PRESS 23 (1933).

[77] *What is Freedom of the Press*, SPECIAL LIBRARIES, Vol. 32, No. 6, pp. 206-08 (July-Aug. 1941).

of its function and from whatever source restraint may spring." [78]

4. *Freedom of Press (the people's right to know) is indivisible.*

Respondent seeks to avoid the impact of the First Amendment by claiming he has sanctioned quotation of his speeches by newspapers and news periodicals.[79] The press is not free, in the constitutional sense, if publication can be arbitrarily limited or denied to any classification of publisher. This Court's rulings forbid such restrictive interpretation of Freedom of Press: "The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." [80]

Elsewhere, the Court said: "Freedom to publish means freedom for all and not for some." [81]

Mr. Justice Douglas' remarks in *United States v. Rumely*, supra, are peculiarly appropriate here: "We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people . . . Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas" (at p. 56).

The court below approved selective and discriminatory application of Freedom of Press, in a Government official's unreviewable discretion. Half-freedom is no freedom at all. If a Government official can determine which portion of the press, if any, may have Freedom of Press, the Constitutional mandate is moribund.

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[78] *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary*, 41 A.B.A.J. 217, 218 (1955).

[79] See, for example, his limited use of "press", Conditional Cross-Petition for a Writ of Certiorari, No. 739, October Term 1960, p. 14, 2nd paragraph.

[80] Lowell v. Griffin, 303 U.S. 444, 452 (1938), per Hughes, Ch. J.

[81] Associated Press v. United States, 326 U.S. 1, 20 (1945).

II. Freedom of Press (the people's right to know) requires freedom of access to publicly-released government materials.[82]

Freedom of Press is nullified without freedom of access to public information. As the *New York Times* editorially stated, freedom to produce a blank page is hardly freedom of press.[83] The President of the United States recognized this fundamental fact when he warned the Congress to protect ". . . the public's right to proper access to public information." [84]

The First Amendment would be sterile today if its sanctions were limited to the mere act of printing. The *Zenger Case* decided that over 200 years ago.[85] This Court has not so limited Freedom of Press: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." [86]

This Court has ruled that Freedom of Press protects not only the publisher's right to print,[87] and the distributor's right to circulate,[88] but also the *public's right to read.*

Butler v. Michigan, 352 U.S. 380 (1957), involved a state statute which made a criminal offense of the publication, sale and distribution of any literature "tending to the corruption of the morals of youth." The statute was challenged as an unconstitutional infringement of freedom of press and due process of law under the First and Fourteenth Amendments. The State's Attorney General denied that the statute did violence either to the free press clause of the First Amendment or to the due process

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[82] This case involves no question of security or executive privilege.

[83] May 31, 1957, §1, p. 26, col. 3.

[84] *Message to the Congress*, "Ethical Conduct in the Government", H. Doc. 145, 87th Cong., 1st Sess., p. 7 (April 27, 1961).

[85] As far back as 1644, Milton's *Areopagitica* was a defense of "the liberty of unlicensed printing", McKeon, Merton & Gellhorn, The Freedom to Read 43 (1957).

[86] In the Matter of Jackson, 96 U.S. 727, 733 (1878), cited with approval in Lovell v. Griffin, *supra* at 452.

[87] Lowell v. Griffin, *supra* at 452; Winters v. New York, 333 U.S. 507, 509 (1948).

[88] In the Matter of Jackson, *supra*; Winters v. New York, *supra*.

clause of the Fourteenth Amendment. And the Attorney General of Texas, *amicus curiae*, claimed that the book there in question was not within the protection of the First Amendment's freedom of press.

The Court unanimously found the statute unconstitutional:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society" (384-85).

Thus, the constitution protects more than freedom to print; without circulation to, and reading by, the public "the publication would be of little value."

The constitutional protection for Freedom of Press, as has been shown, was designed to achieve an end, *the right of the public to know* (by reading), and in particular the right of the public to read (and thus know) what its Government officials do and say. In order to accomplish this end—which the Court has ruled to be included within the constitutional protection of each individual American—it is necessary to have access. Freedom of Press must, at the very least, include *freedom of access* to materials officially and publicly released by the Government. Anything less would hamstring the fundamental objective of the First Amendment, the people's right to read as a means of achieving *the people's right to know.*

That freedom of access is an integral part of Freedom of Press has been recognized and asserted by legal scholars. A distinguished Federal judge wrote:

> "Governmental activities do not allow differentiation between what is private and what is public. All the business persons in public office, high or low, perform is of a *public nature.* So there is no conflict, as in the case of privacy, between the individual rights and the public's demands—but rather between the right of the public to be informed and the

arrogative right of persons in public office to withhold information."

"The adoption in the Federal and State constitutions of the guarantee of freedom of speech and press and of the other democratic rights led to the recognition of the right of access and publication of the activities of public men and public bodies."

"Ours is a government by discussion. Its strength lies in knowledge . . . Our democratic society derives its power from the people and must allow public access to all matters relating to the public's business. Only as the press serves the public right to know assiduously is the freedom of press important."

"If those in public office arrogate to themselves the unrestricted power to determine what information shall be made known to the public, it would become too easy for them to conceal their conduct and misconduct — their deeds and misdeeds." [89]

Harold L. Cross, Freedom of Information Counsel for the American Society of Newspaper Editors, and long-time Professor of Newspaper Law at Columbia University's Graduate School of Journalism, said:

"Freedom of information in the form of access to public records and proceedings is a constituent part—is, indeed, the very foundation stone—of freedom of speech and of the press under our 1st amendment . . .

"The history of the struggle for freedom of speech and of the press, as an overriding principle of democracy vested in every man, bars any notion that the men of 1791 intended to provide for freedom to disseminate information about Government but at the same time intended to allow Government to deny freedom of obtaining such information. Our forebears' purpose was to prevent 'any action by Government' by means whereof it might prevent free and general discussion. Without

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[89] Yankwich, *Legal Implications of, and Barriers to, The Right to Know*, 40 MARQ. L. REV. 3, 6, 33, 35 (Summer 1956).

a right of access to information, freedom to print information is fettered into futility." [90]

More close to home, so to speak, is a letter from the Hon. Murray Snyder, Assistant Secretary of Defense, to the Petitioner, Sept. 10, 1959, concerning the refusal of the Secretary of Defense to permit the Commanding General of the Strategic Air Command to publish a book commercially through private and exclusive contract. This letter says in part:

> "As to the matter of private writings by Department personnel, it has been the established policy of the Department for years that key civilian and military officials may not as private individuals author for exclusive publication, articles or books dealing with national defense plans, policies or programs except for publication in official or unofficial Service Journals and in recognized scientific or professional magazines, journals, encyclopedias and the like.
>
> "Among the reasons for this policy are: *the need to insure the right of the general public to have access to official information through the normally accepted public information media sources and without the payment of substantial tolls for it; . . .* " (emphasis added).

Leading journalists have urged that their trusteeship of the people's right to know requires the right of access: "Free reporting is as much the product of access to news as of the absence of restraint in transmitting it." [91]

A Pulitzer Prize-winning journalist who is also a lawyer, speaking representatively for the journalism profession, said: "A free press must also embody a free access to the operations of governmental agencies and the activities of Government officials. There can be no real right to criticize unless there is a freedom of access to facts upon which to base an informed and

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[90] "Availability of Information from Federal Departments and Agencies", Part 3, *Hearings Before Subcom., House Comm. Govt. Opera., 84th Cong.*, 2nd Sess., May 8 and 9, 1956, p. 441. See also CROSS, THE PEOPLE'S RIGHT TO KNOW 131-32 (1953).

[91] Editorial, Washington Post, March 27, 1961, p. A14, col. 2.

intelligent criticism." [92]

On the facts of the instant case, Petitioner's constitutionally-protected Freedom of Press includes the right of access to Respondent Government official's publicly-released speeches delivered while he was on official duty on subjects connected with and directly related to his official duty. Therefore, Respondent's receiving, and the United States Government's issuing, a copyright registration over such speeches is in contravention of Petitioner publisher's right of Freedom of Press under the First Amendment to the Constitution.

III. Decision of court below abridges Freedom of Press and hobbles the people's *right to know.*

If Respondent is permitted valid copyright monopoly over his speeches on subjects connected with and directly related to his official responsibilities, he can deny to anyone, including the daily press and news periodicals, the right to quote these speeches. That he granted such limited right is a matter of grace on his part, not a question of right on the part of the press. In the instant case Respondent actually exercised his copyright power to shut off all press rights or turn them on at will. When first he copyrighted the speeches, he allowed only "contemporaneous press use" (R.17). Later he decided to change this permission to read "for newspapers or news periodicals (R.18).

Today Respondent favors the daily press; tomorrow he may turn on it. A free press cannot exist on the basis of juggled and discriminatory permissions granted or withheld solely by the grace of a Government official.

By sanctioning Respondent's right to conceal or selectively to release officially published Government materials, the court below hobbles the public's *right to know.* The Constitutional guarantee of a free press is lost if its effectiveness depends on the sufferance of those from whom the Constitution guaranteed

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[92] Clark R. Mollenhoff, for Sigma Delta Chi, journalistic society, "Freedom of Information and Secrecy in Government", *Hearings on S. 921, 85th Cong., 2nd Sess., Part II, April 16, 1958, Sen. Jud. Comm., Subcom. on Constitutional Rights,* p. 616.

the press freedom.

The decision of the court below, if allowed to stand, permits a Government official to

—dictate or manipulate the press' use of an officially-issued press release of a speech on official business made during official duty,

—make it available only to those who speak favorably of him and interpret it in an "approved" manner, and

—limit its use to political, social, religious, commercial or other favorites.

In other words, the decision below means that a Government official can deny, limit or restrict the press' and the public's access to officially released and sanctioned Government press releases except on his own terms. This result conflicts with the constitutional and statutory bases of the copyright act as described by the Register of Copyrights: "Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail." [93]

This Court has warned against the dangers in limiting Government information to what a Government official pleases to make known. In a case arising out of the Teapot Dome scandals of the 1920's the Court said: "Experience has taught us that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete . . ." [94]

This year the Court issued another warning that is pertinent to the instant case. The "spike mike" decision, said Mr. Justice Stewart, "is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely,

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[93] *Report of Register of Copyrights, supra*, at p. 6.

[94] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U.S. 616, 635." [95]

That Respondent is, as Petitioner readily concedes, a person of good will is irrelevant. As Mr. Justice Clark said for the Court in the last term: "It is no consolation to an individual denied . . . the equal protection of the laws that it was done in good faith." [96] Mr. Justice Brandeis once said: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." [97]

An experienced journalist-lawyer told the Senate that: ". . . we must be guided by this principle: 'never trust a good man to make secret decisions for you, if it would frighten you to lodge the same power in an evil man or a man who is on the other side of the political fence'." [98]

Here we have far more than "harmless, empty shadows".[99] A "pragmatic assessment" [100] of the present situation in the Petition for a Writ of Certiorari in this case discloses what elsewhere, in a different context, Mr. Justice Brennan called "dismal pictures of official lawlessness",[101] through systematized evasion of the statutory prohibitions against copyrighting "Government publications".[102] Respondent seeks to justify his action because others may allegedly have done likewise. Long-repeated violation of the Constitution does not invoke legitimacy upon the violation.[103]

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[95] Silverman v. United States, 365 U.S. 505, 512 (1961).

[96] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[97] Olmstead v. United States, 277 U.S. 438, 479 (1929), dissenting.

[98] Mollenhoff, Senate Judiciary Committee, Subcommittee on Constitutional Rights, "Freedom of Information and Secrecy in Government", *Hearings on S. 921*, 85th Cong., 2nd Sess., Part II, April 16, 1958, p. 615.

[99] Poe v. Ullman, 367 U.S. 497, 508 (1961).

[100] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

[101] Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 778 (1961).

[102] See Petition in No. 649, Oct. Term, 1960, pp. 18-22 and Appendices E-K (inc.).

In the exercise of its judicial responsibilities, this Court has refused to shut its eyes to "the plainest facts of our national life".[104] Therefore, it is important to realize that inconspicuous suppression of Government publications can effectively be achieved through copyright. The greater portion of all copyrighted material is not accessible to the public at large. For example, less than half of all works deposited for copyright registration were transferred to the Library of Congress [105] and not all that is so transferred is added to the Library's permanent collections.[106] Only 36% of all books and pamphlets received by the Copyright Office were wanted by that Library, most of the rest being returned or destroyed.[107] Thus, the preponderant portion of copyrighted material never appears in the official card catalogs of the Library of Congress or in the catalog cards it furnishes to the nation's libraries. More specifically, Respondent's copyrighting of his 23 speeches did not result in any single one of them being listed in the public card catalog of the Library of Congress. For practical purposes therefore, the copyrighting of Admiral Rickover's speeches is actual suppression of them since the public at large has no means of becoming aware of them or of obtaining access to them.

The United States Government is party to the violation of Petitioner's constitutionally-protected Freedom of Press in two respects:[108]

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[104] See, e.g., Brown v. Board of Education, 349 U.S. 294 (1954); Cooper v. Aaron, 358 U.S. 1 (1958). As to breaking up a "long habit" of illegality, see United States v. E. I. Du Pont de Nemours, 366 U.S. 316 (1961).

[105] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

[105] *Report of Register of Copyrights, supra* at 21; Dunne, *Deposit of Copyrighted Works*, in COPYRIGHT LAW REVISION, Studies Prepared [by the Copyright Office] for the *Subcom. on Patents, Trademarks, and Copyrights, Sen. Jud. Com.*, Pursuant to Sen. Res. 240, 86th Cong., 2nd Sess. (1960), Study No. 20, pp. 27-39.

[106] Fisher, *The Copyright Office and the Examinations of Claims to Copyright*, 1953 COPYRIGHT PROBLEMS ANALYZED 12.

[107] See 17 U.S.C. 214.

[108] Petition makes no claim that the applicable statutes are unconstitutional when properly interpreted.

(1) its specific refusal,[109] as Respondent's employer, to prevent him from illegally and unconstitutionally copyrighting "Government publications",[110] has made the Government "a joint participant in the challenged activity";[111] and

(2) as administrator of the Copyright Office the Government issued a copyright registration on a "Government publication" contrary to statute[112] the Constitution,[113] and its own established and published policy.[114] In so doing, the Copyright Office improperly failed to exercise its authority to refuse registration to deposited articles which are not copyrightable.[115]

By actior of Respondent and the United States Government, the Petitioner has been deprived of its rights of Freedom of Press guaranteed to it by the First Amendment to the Constitution.

IV. The Constitution is a living document. Freedom of Press includes *freedom of access* to publicly-released government materials.

[109] R.27, 111.

[110] For a different affirmative action taken in another similar case, see letter from Asst. Secretary of Defense Snyder, *supra*, p. 52. For general statement to same effect, see House Com. on Govt. Oper., "Availability of Information from Federal Departments and Agencies," 24th Report, 86th Cong., 2nd Sess., H. Rep. No. 2084 (July 2, 1960), at p. 62.

[111] Burton v. Wilmington Parking Authority, *supra* at 725.

[112] 17 U.S.C. 8, 11.

[113] Petitioner respectfully calls to the Court's attention that the Copyright Office was not advised that the items submitted by Respondent for registration had in fact been previously issued and distributed as official Government press releases. Respondent did not disclose this fact and instead submitted specially prepared copies for this purpose. See ¶3(e), Statement of Facts, *supra*, p. 4. *Cf*: Regulations of the Copyright Office, 37 C.F.R. 201.3 (b) (3).

[114] The Register of Copyrights reported the following policy to the Congress: "Any work produced by a Government employee within the scope of his employment is not copyrightable, even though issued by a private publisher", *Report of Register of Copyrights*, *supra*, at p. 131.

[115] *Id.* at 75 ("The Register of Copyrights has for many years exercised the authority to refuse registration when he finds that the article deposited is not copyrightable . . .").

The Constitution is a livi g and sensitive instrument which adjusts to the major needs of the times:

"The Constitution of the United States . . . was made for an undefined and expanding future.

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." [116]

With reference to the meaning of words in constitutional context, Mr. Justice Holmes said:

"[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begettors . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [117]

During the last term the Court cited with approval another comment by Mr. Justice Holmes that is relevant:

"But as Mr. Justice Holmes once said: 'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.' *Compers v. United States*, 233 U.S. 604, 610." [118]

The sensitivity of the Constitution to "the new circumstances and situations" constantly facing the American people, its "adaptability", [119] is especially true of the great liberties protect-

[116] Hurtado v. California, 110 U.S. 516, 531, 530 (1884).

[117] Missouri v. Holland, 252 U.S. 416, 433 (1922).

[118] Konigsberg v. State Bar of California, 366 U.S. 36, 49-50, note 10 (1961).

ed by the First Amendment.

As Mr. Justice Frankfurter said: "Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency . . . Like currency words sometimes appreciate or depreciate in value." [120]

Words, as has been said in this Court, can "import a policy that goes beyond them". [121] In constitutional interpretation it is necessary to go "far beyond the meaning of the phrase in isolation" to its "guiding history". [122]

The purpose of Constitutional provisions is the controlling feature in their application according to this Court. Mr. Justice McKenna said for the Court:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.* This is peculiarly true of constitutions . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power . . . *Rights declared in words might be lost in reality.* And this has been recognized. The meaning and vitality of the Constitution has been developed against narrow and restrictive construction." [123]

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[119] Appalachian Coals Inc. v. United States, 288 U.S. 344, 360 (1933), per Hughes, Ch. J.

[120] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 537-38 (1947).

[121] Holmes, J., Olmstead v. United States, *supra* at 469, dissenting.

[122] Chapman v. United States, 365 U.S. 610, 619 (1961), per Frankfurter, J., concurring. *Cf*: "Reasoning which in one age would make no impression whatsoever, in the next age is received with enthusiastic applause", I LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE, vii (1865).

[123] Weems v. United States, 217 U.S. 349, 373 (1910) (emphasis add-

This Court has long been responsive to the special need for guarding First Amendment rights "with a jealous eye".[124] A liberal interpretation of such rights has been called by the Court "the only conclusion supported by history":

> "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." [125]

First Amendment rights have been persistently protected by this Court from erosion by indirection as well as by direct act.[126] "Sophisticated as well as simple minded" evasions of Constitutional rights have been condemned.[127] This Court has declared that "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." [128] The substance, "the thing", in Freedom of Press, is *freedom of access.*

The extraordinary genius of the Bill of Rights is its adaptability to the problems of each successive generation of Americans. The present generation's special and urgent problem is the

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ed). *Cf*: Mr. Justice Harlan, dissenting, Poe v. Ullman, 367 U.S. 497, 544 (1961).

[124] AFL v. Swing, 312 U.S. 321, 325 (1941).

[125] Bridges v. California, 314 U.S. 252, 263, 265 (1941). See also Olmstead v. United States, *supra* at 471, 476.

[126] Guinn v. United States, 238 U.S. 347, 361 (1915); Grosjean v. Amer. Press Co., 297 U.S. 233, 250 (1936); Speiser v. Randall, 357 U.S. 513, 518 (1958). See also United States ex rel Milwaukee Publication Co. v. Burleson, 255 U.S. 407, 430-31 (1931) (Brandeis, J., dissenting); United States v. Rumely, 345 U.S. 41, 58 (1953) (Douglas, J., concurring).

[127] See Mr. Justice Frankfurter's comment, Lane v. Wilson, 307 U.S. 268, 275 (1939). *Cf*: Louisiana ex rel Gremelion v. NAACP, 366 U.S. 293 (1961).

[128] Cummings v. Missouri, 4 Wall. 277, 325 (1866).

protection and assurance of the American people's right of access to official Government documents and publications. The history of the struggle for Freedom of Press bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it. In the context of mid-20th century America and the present world situation, *Freedom of Press must embody free access to facts concerning the Government's operation (at the very least where no questions of security or executive privilege prevail) and free access to all officially-released Government materials prepared by Government officials in the course of their official duties.* The very nature of First Amendment rights calls for their expansion to meet new and undecided issues. Such is this case.

PUBLIC DOMAIN ARGUMENT — Reply to Respondent's Main Brief in No. 55 [129]

Respondent (as Cross-Petitioner in No. 55) seeks a reversal of the decision below insofar as it rules that he forfeited the right to copyright the first 22 speeches because they were widely distributed and published without a copyright notice, dedicating them to the public domain. Respondent seems to admit that there was publication but claims it was not "of such wide and general nature" as to constitute general publication which forfeits copyright eligibility. He also claims that since the material comprised public speeches, not a book, the widespread distribution of physical copies should not be regarded as a general publication (Part II-D). It is, of course, unnecessary for this Court to reach this issue at all if the Petitioner in No. 36 prevails on either the statutory or constitutional arguments heretofore presented.

The Copyright Law provides that "No copyright shall subsist in the original text of any work which is in the public domain",

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[129] By agreement between the parties, filed with Clerk, affirmative briefs were exchanged in typewritten form prior to submission of the printed briefs, in order that the main briefs might include each party's affirmative statement and the reply to the other party's affirmative statement.

17 U.S.C. 8. To achieve copyright, a notice must appear on each copy of each work prior to or at the time of publication, 17 U.S.C. 10.[130] It is undisputed that Respondent failed to place such a copyright notice on the first 22 speeches prior to their distribution.[131]

There is no directly applicable statutory definition of "publication". The question here is whether the admitted distribution which took place in this case constituted a general or a limited publication. The court below ruled as follows:

> "The agreed facts . . . show a wide distribution not only to the press but also to people generally who desired copies through interest in the subjects of the addresses. The handling of the addresses prior to December 1, 1958, when copyrighting was first attempted, indicated a studied effort not only to secure publicity for the contents of the addresses through channels of information, but to go beyond customary sources of press or broadcasting in distributing the addresses to any interested individual . . . The agreed statement of facts in the case under consideration shows no effort to limit distribution of the speeches delivered prior to December 1, 1958, but rather a willingness to make them available to all who might be interested. Certainly when all of Admiral Rickover's acts of distribution are considered together . . . it is difficult to avoid the conclusion that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain. There is no effort shown to protect that author's private right in any way, no limitation upon those who might obtain copies. *That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies*, 'All claims to copyright

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[130] *Cf*: De Jonge and Co. v. Breuker and Kessler Co., 235 U.S. 33, 36 (1914); Mifflin v. Dutton, 190 U.S. 265 (1903). See decision of Court below, 284 F. 2d. at 269 (R.57

[131] But see 17 U.S.C. 26 which defines "publication" in terms of copyright duration. The Court below regarded this as "some indication of Congressional thinking on the subject", 284 F. 2d at 269 (R.57).

waived'," 284 F. 2d at 270-271 (R.58-60) (emphasis supplied).

After stating that "distribution was not limited in any way to a particular group" and that there was no limitation on the use of the speeches, the Court below concluded: "It is the complete absence of limitation on the use of the printed distributions by anyone at any time which destroyed the common law rights of the author", 284 F. 2d at 271 (R.61).

Petitioner respectfully submits that the decision of the court below on this issue of publication and dedication to the public domain is correct, both as to the rule of law adopted and as to its application to the undisputed facts of the instant case.

I. The issue: Distribution of copies to the public.

Contrary to Respondent's efforts in Parts II D and E of his Main Brief to make it appear otherwise, this case does not involve any question whether mere oral delivery of a lecture, as such,[132] without the accompanying widespread distribution of physical copies of the speeches,[133] as press releases,[134] constitutes publication. The sole issue in No. 55 is whether the facts in this case fall within the law as stated in the Copyright Office's Regulation that "If publication occurs by distribution of copies . . .. without the statutory notice . . .. the right to secure copyright is lost . . .", 37 C.F.R. 202(a)(2).

If Respondent prevails in his contention that his speeches were not published, then the thrust of Petitioner's constitutional argu-

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[132] Wholly irrelevant consequently are the cited cases dealing with oral delivery, Nutt v. National Institute, 31 F. 2d 236 (2d Cir. 1929), or performance rights, Ferris v. Frohman, 223 U.S. 424 (1912).

[133] *Cf*: COPINGER AND SKONE JONES, LAW OF COPYRIGHT 30 (1958); Selvin, *Should Performance Dedicate*, 42 CAL. L. REV. 40, 46 (1954); Schulman, *Author's Rights*, 7 COPYRIGHT PROBLEMS ANALYZED 19, 24 (1951).

[134] Respondent seeks to make much of the fact that the press releases contained language such as "Please Note Date" and "Hold for Release Until Delivery . . ." It is noteworthy that Richard Wagner's *Parsifal* was held to have been published even though the score carried a legend forbidding performance, Wagner v. Canfried, 125 Fed. 798 (C.C.S.D., N.Y., 1903).

ment becomes even more pointed because the owner of unpublished material has the common law right of complete and utter censorship over such materials through a perpetual monopoly over them.[135]

II. The facts: No limitation of any character on persons to whom the speeches were distributable or on use that could be made of speeches.

The agreed statement of facts in this case shows (*supra*, Statement of Facts, p. 5) that

1) Each of the first 22 speeches, except Numbers 7 and 12, was officially issued as a press release of the United States Department of Defense or the U.S. Atomic Energy Commission.
2) None of them bore a copyright notice at the time of issuance and distribution.
3) None of them, at the time of issuance and distribution, bore any written or oral restriction or limitation whatsoever upon their use or publication, in whole or in part, or upon their distribution or availability.
4) Each of these 22 speeches, except for Numbers 7 and 12, were—in addition to being officially and publicly issued as Government press releases—distributed by the Admiral himself in the following manner:

   (a) approximately 50 copies to the sponsor of each speech "to be made available to the press and others . . .",

   (b) mailed "to individuals who had requested copies or who [sic] Admiral Rickover believed would be interested in the subject", and

   (c) at the National Press Club in Washington, D. C., for the use of any and all who cared to pick up a copy there,

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[135] Copyright Law, 17 U.S.C. 2; Wilson, *The Scholar and the Copyright Law*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 10, 105-6, 113, 117 (1959); Roberts, *Publication in the Law of Copyright*, *id.*, No. 9 at 110 (1958); Pickard, *Common-Law Rights Before Publication*, *id.*, No. 3, at 209 (1940); Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. SOC. 642, 646 (1955).

although none of these speeches was delivered at that location.

III. General publication means distribution unrestricted either as to person or use.

The leading case defining general and limited publication is *Werckmeister*, wherein suit was brought to restrain infringement of copyright in a painting which had been exhibited at the Royal Academy of Arts in London. The Academy's rules included the provision that "No permission to copy works during the term of the exhibition shall on any account be granted." Judge Townsend, in the Second Circuit, held that the exhibition was a limited publication because of the Exhibit's rule against copies:

> "A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public . . . [Because of the rule against copying] such exhibition did not amount to a general publication." [136]

The court also said that "the unrestricted offer of even a single copy to the public implies the surrender of the common-law right" (p. 325). It stated the test of general publication as

> "whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed" (325).

When the *Werckmeister Case* reached this Court, the Court said that Judge Townsend's opinion "leaves little to be added to the discussion." [137] This Court ruled:

> " . . . There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place . . . [W]e think that the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with

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[136] Werckmeister v. American Lithographic Co., 134 Fed. 321, 324, 330 (2d Cir. 1904).

[137] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907).

the acts shown, not to permit such an inspection of his picture as would throw its use open to the public" (300).

In *Werckmeister*, said this Court, the publication was "under conditions which exclude the presumption that it was intended to be dedicated to the public" (299). This Court stated the basic rule of law as follows:

> "It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property." [138]

Another leading case which supports Petitioner's contention is *White v. Kimmel*, 193 F. 2d 744 (9th Cir. 1952), *reh. denied* 1952, *cert. denied* 343 U.S. 957 (1952). There the basic rule of law was thus stated:

> ". . . a limited publication which communicates the contents of a manuscript to a definitely selected group for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication' which does not result in the loss of the author's common-law right to his manuscript; *but that circulation must be restricted both as to person and purpose, or it cannot be called a private or limited publication*" (at 756-747, emphasis supplied).

This oft-cited case [139] presented circumstances which to a startling degree are similar to those of the instant case. There the claim was that the author had dedicated his manuscript to the public domain by "reproducing and distributing copies himself and permitting others to do so without limitation as to use or right to republish and without notice of claim of copyright", and the Court so found. In the *White Case*, the author's secre-

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[138] The Court adopted as its own the above-quoted statement from SLATER ON THE LAW OF COPYRIGHTS AND TRADEMARKS 92.

[139] See, for example, American Visuals Corp. v. Holland, 239 F. 2d 740, 744 (2d Cir. 1956); Continental Casualty Co. v. Beardsley, 253 F. 2d 702, 706-7 (2d Cir. 1958), *cert. denied* 358 U.S. 816 (1958); Hirshon v. United Artists Corp., 243 F. 2d 640, 644 (D.C. Cir. 1957); McIntyre v. Double-A Music Corp., 166 F. Supp. 681, 682 (S.D. Calif. 1958).

tary ran off some 60 to 70 mimeographed copies and, at his request, mailed 18 to 20 to a list of names supplied by him, with a transmittal note that it was sent because "of your interest". With the author's permission, other copies were distributed to interested persons. No limitation was placed on the persons to whom it could be distributed. A later run of 40 to 50 copies was distributed by the author "to friends and in part to strangers who wrote him requesting a copy."

The Court in *White* commented on the facts of that case:

> "Nobody seeking the mimeographed manuscript appears to have been asked for any sort of credentials. In a word, we are unable to see in this picture any definitely selected individuals or any limited, ascertainable group or class to whom the communication was restricted . . . *His only apparent purpose was to enable any person interested to obtain a copy of the manuscript* . . . Such a purpose, we think, is too broadly general and indefinite to satisfy the test of a limited publication" (at 747, emphasis supplied).

This Court in *Werckmeister* laid down the rule that the necessary feature of a limited publication is the restriction placed upon the general public in its use of the material involved. *White* outlined the contours of the required restriction, and required that it must apply *both* to persons and purpose (or use). Applying the rules of both these leading cases to the instant case, it is clear that the actual distribution of physical copies of the Admiral's speeches constituted a general publication. The unrestricted distribution of such press releases was such "as to justify the belief that it took place with the intention of rendering such work common property" (*Werckmeister*).[140] The wholly

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[140] An author's intention for a limited publication is insufficient to achieve such if in fact no restriction on use is evidenced. National Comic Publications v. Fawcett Publications, 191 F. 2d 594, 598 (2d Cir. 1951), opin. clarified 198 F. 2d 927 (1952). See also White v. Kimmel, *supra*, at 747; 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 691 (1938); Nimmer, *Copyright Publication*, 56 COL. L. REV. 184, 201 (1956); Schlattman, *The Doctrine of Limited Publication*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 5, at 66 (1954).

unlimited authorization for use of the copies of the speech was "such surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom it may be committed". The unrestricted offer of a substantial number of copies entailed "surrender of the common law right" of the author. The undisputed facts make it crystal-clear that (1) no limitations of any kind whatsoever were placed on the persons obtaining copies or on the use they could make thereof, and (2) the Admiral acted in such a manner as to make copies of these speeches "open to the public".

White required that the circulation must be restricted as to *both* person and purpose before it is a limited publication. If it be unrestricted *either* as to persons,[141] or as to purpose or use,[142] it is a general publication. In the instant case, copies of the Admiral's speeches were openly available to anyone and everyone who was interested and not merely to a limited class of persons; there was no restriction as to "the persons to whom they could go."[143] There was no limitation of the use of such speeches for any "special purpose."[144] The press release copies were freely distributed "without reservation of rights"[145] and under circumstances which clearly made them freely available to "all comers".[146] A comment made on the *White Case* is precisely applicable to the instant case: "No one seeking the

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[141] See Ladd v. Oxnard, 75 Fed. 705, 729-730 (D. Mass. 1896); Nimmer, *op. cit. supra*, at 200-201.

[142] See Schlattman, *op. cit. supra*, at 53.

[143] Walden, *op. cit. supra*, at 653.

[144] See Wagner v. Canfried, *supra*, at 800-801.

[145] *Cf*: Patterson v. Century Productions, 93 F. 2d 489, 492 (2d Cir. 1937), *cert. denied* 303 U.S. 655 (1938); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 131 (1944). The *U.S. Navy Public Information Manual*, Article 2301(1), states: "More than fifty million newspapers are sold in the United States every day. It is believed that each paper is read by at least two people. Thus we can say that almost all Americans read the daily papers. As a medium, therefore, newspapers are the single most effective way of reaching the largest possible audience."

[146] See Nimmer, *op. cit. supra*, at 187. *Cf*: Case Comment, 45 IOWA L. REV. 896, 901 (1960).

mimeographed manuscript seems to have been asked for any sort of credentials."[147] The completely unrestricted accessibility[148] and usability of the copies of the Respondent's speeches, lacking any copyright notice, makes the distribution a general and divestitive[149] publication which dedicates them to the public domain.[150]

Another, and unique, feature of the present case is that the Admiral himself distributed copies of the first 22 speeches as "handouts",[151] for unsupervised distribution, at the National Press Club in Washington, D. C., although this was not the locale for the delivery of any of these speeches. This Club is frequented by a wide variety of persons and membership is not limited to the press.[152] Moreover, the Club is constantly used for public and private affairs of various groups unrelated to the press. In each instance, the press releases on the "handout" rack are openly available for any who desires to take them. Distribution of the Respondent's speeches at the Club was an open invitation to anyone, not merely members of the press covering his speech or the audience listening to it, to take a copy, without the slightest indication of limitation as to persons or purpose.

By virtue of the National Press Club's policy above-described, its dining and meeting facilities are not unlike those of a hotel.

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[147] Walden, *op. cit. supra*, at 653.

[148] Ball, *op. cit. supra*, at 140, 414.

[149] Recent Cases, 73 Harv. L. Rev. 1219, 1222 (1960). In pressing the distinction between "investitive" and "divestitive" publication, Respondent's principal citation (Part II-A) is Kaplan and Brown, Cases on Copyright 52-64 (1960). Three main cases appear in the indicated pages, two of which (White v. Kimmel, and American Visuals Corp. v. Holland) are major precedents for Petitioner, as cited herein, and the third of which held that divestitive publication had taken place.

[150] See Schlattman, *op. cit. supra*, at 65-66.

[151] See Bruce Catton, *Handouts*, in Dateline: Washington, The Story of National Affairs Journalism in the Life and Times of the National Press Club 167 (1949).

[152] Associate members need only be actual or potential sources of news, and may total 90% of the number of active (or working press) members. National Press Club, *Constitution*, §4.

In *D'Ole v. Kansas City Star Company*, the court had to decide the status of materials which had been freely left available at a public place. The court held that such fact constituted a general publication:

> ". . . it is safe to say that the appearance of a pamphlet, after its delivery to Plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly is a 'rendering it accessible to public scrutiny' and was likewise 'a communicating it to the public by distribution of copies.'" [153]

A similar situation arose in *American Visuals Corporation v. Holland*,[154] where an author was endeavoring to find a publisher among insurance companies. On one occasion, 100 copies of his manuscript were placed on a hotel table, along with other publications for "unsupervised distribution", during a convention of insurance executives. No limitation was placed on the persons who might obtain copies by picking them up from the table or otherwise. The Court held that such distribution resulted in a general distribution of the manuscript. After citing *White* and its rule of limitation as to persons and purpose, the Second Circuit held:

> "But the plaintiff placed no limitation on who could inspect, retain or receive, through any of the original distribution, a copy of his work . . . We conclude, therefore that while the 'purpose' of the distribution was limited [to obtain a publisher], the 'persons' to whom it might be given was unlimited" (at 744).[155]

A brief summary of the present law has just recently been stated officially by The Register of Copyrights, thus: "Under our present law, 'publication' means making copies of a work available to the public."[156]

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[153] 94 Fed. 840, 842 (Cir. Ct. W.D. Mo. 1899), cited with approval in American Visuals Corp. v. Holland, *supra*, at 745.

[154] 239 F. 2d 740 (2d Cir. 1956).

[155] *Cf*: "Giving away to patrons or passers-by, lending copies to anyone who applies, appears to be a public distribution." LADAS, *op. cit. supra*, at 691. See BALL, *op. cit. supra*, at 140.

[156] *Report of Register of Copyrights*, p. 31.

The Petitioner respectfully submits that the Court below correctly held that Respondent's distribution of his first 22 speeches constituted a general publication which dedicated them to the public domain and therefore made them uncopyrightable.

CONCLUSION

For the reasons stated, Petitioner in No. 36 respectfully submits that the decision and judgment of the Court below should be

1) *reversed* in No. 36, insofar as it held that the copies of the speeches in question were not "Government publications" and were therefore susceptible of valid copyright, and

2) *affirmed* in No. 55, if it be necessary to reach this issue at all in view of the holding on the previous point, insofar as the Court below held that the distribution of the first 22 speeches was a general publication which dedicated them to the public domain.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

No. 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as PUBLIC AFFAIRS PRESS, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

No. 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

Public Affairs Associates, Inc., Trading as Public Affairs Press, respectfully submit this reply brief to indicate that the brief submitted by Respondent Admiral fails to present any valid reason for denial of the relief requested by the Petitioner.

I. FREEDOM OF PRESS

A. Respondent's arguments would undermine the structure of the Government's information services and the American people's "right to know".

Respondent's arguments, if accepted, would make a shambles of press coverage of Government departments and would undermine the entire structure of Government information services to the American people.

"Nowhere", says Respondent's Brief (p. 26), "do they [the speeches] purport to express or explain official activities or pronouncements."

Nowhere, of course, except

—in official Government press releases, issued by his employer agencies, without any disclaimer, either by the Government or the Admiral, of the official status of these documents,

—in official publications providing the public and the press with the statements of a high-level Government officer,

—in official advice, on the face of such documents, that other Government officers are available for further information statements.

How else can the United States Government advise the press and the American people that a document is official other than by the means here used—labelling it as such, treating it as such, and issuing and distributing it as such?

Respondent's disregard for the public's *right to know* is patent in the statement of his Brief that "This question of the

use of a disclaimer. . . . is not one of substance" (p. 41). If this be correct, chaos would result in the American press. The press would never be able to know when an official Government press release could be accepted on its face as official. Each such release would have to be individually checked to determine whether it was an official or a private document. Furthermore, if the document could not speak for itself, whom could the press trust to say whether it was or was not official? And if what appears to be official can be retroactively designated as private, how is the American public to know what is official and what is private?

It is respectfully submitted that this whole proposition advanced by the Respondent, that an official Government press release is *not* an official Government press release, is too preposterous, and too dangerous to the public welfare, for serious consideration.

Furthermore, Respondent's brief seeks to confuse the issue by citing his book as proof that his *speeches* were not official (p. 26). Petitioner has clearly stated that it raises no issue about the book (Brief, p. 38, note 61); the speeches, however, are not controlled by the book's status.[1]

Respondent's Brief (p. 36) seeks to dismiss three cases cited in Petitioner's Brief (*Barr v. Matteo*, *Spalding v. Vilas*, and *United States v. MacDaniel*) with the comment that "In these cases the officials were purporting to act in the line of duty and on behalf of the Government." In the instant case the record shows that Admiral Rickover was "purporting to act in the line of duty and on behalf of the Government." This is precisely what Admiral Rickover did by

—issuing his speeches as official Government press releases, and with all his official titles as identification, using the whole

[1] Respondent's book contains only 9 of the 23 speeches involved in this proceeding, all 9 admittedly "substantially rewritten". The book does not include any of Respondent's 10 speeches dealing with nuclear energy or with the effect of atomic power on naval warfare, on the industrial construction of naval vessels or on the production of electric power from nuclear energy.

panoply of official Government auspices, facilities, and services to publicize them as official documents, and by

—failing or refusing to disclaim official status for the speeches, as he was required by the Department of the Navy to do if they were personal. See Petitioner's Brief, pp. 5-6.

Respondent's apparent misconception of the relevant constitutional issue results in his claim (on page 52) that "The First Amendment does not confer upon publishers . . . any constitutional right of access to *information not available to others*" (emphasis added).

Petitioner does not claim any right of access to information not available to all others to whom the Constitutional guaranty applies. On the contrary, it is only because of the Petitioner's claim that the particular official information involved is *open to all* that Petitioner claims that it, too, has such right of access. Consequently, not only are the cases cited by the Respondent at the noted page irrelevant to the issue, but the issue as stated by the Respondent is irrelevant to the instant case.

B. "Fair use" doctrine inapplicable here

Respondent would deny Petitioner's claim to a Constitutional right of Free Press on the ground that the press's only protection is through "fair use". (See Respondent's Brief, pp. 48-50, and his Cross-Petition, No. 739, Oct. Term, 1960, p. 14). The doctrine of "fair use" is almost wholly inapplicable to the facts of the instant case and, in any event, cannot be used as a substitute for a constitutional right of Free Press:

(1) "Fair use" applies only to copyrighted works

The doctrine of "fair use" does not apply to unpublished and uncopyrighted works.[2] It is undisputed that the first 22

[2] BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 note 5 (1944). To the same effect, see: Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIB. J. 197, 200 (1953) (" . . . the doctrine of *fair use* does not apply to unpublished literary works in the United States"); Lattman, *Fair Use of Copyrighted Works*, in COPY-

speeches were not copyrighted at the time they were delivered and issued as official Government Press releases (R. 7). (The gravemen of Respondent's argument is that these speeches were not "published" when so issued.[3]) Consequently, so far as these 22 speeches are concerned the Respondent's argument on "fair use" falls of its own weight as inapplicable to the admitted and undisputed facts of this case.

(2) "Fair use" fails to protect people's "right to know"

The "fair use" doctrine is so ill-defined, so undependable in actual use, and so limited in scope that it denies to the public any real protection for its "right to know" what Government officials say and do in their official capacity.

(a) "Fair use" too undefined

The Register of Copyrights says that the term "eludes precise definition."[4] Smith, a Senior Attorney in the Copyright Office, says that it is "a vague concept; its limits have never been defined."[5] And Lattman, Special Advisor to the Copyright

RIGHT LAW REVISION, Studies Prepared [by the Copyright Office] for the Subcom. on Patents, Trademarks, and Copyrights, Sen. Jud. Com., Pursuant to Sen. Res. 240, 86th Cong., 2d Sess. (1960), Study No. 14, p. 7 (" . . . the fair use doctrine does not apply to common law literary property"); Wilson, *The Scholar and the Copyright Law*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 10, at 113 (1960) ("Yet our courts have consistently held that unpublished material . . . is not even subject to fair use"). Cf: Register of Copyrights, COPYRIGHT LAW REVISION, *A Report on the General Revision of the U. S. Copyright Law*, House Com. Print, House Comm. on Jud., 87th Cong., 1st Sess., July 1961, p. 24 [hereinafter referred to as *Report of Register of Copyrights*]; Copyright Office, *"Fair Use" of Copyrighted Works*, Bull. No. 20, ¶2 (1958). See also Copyright Law, 17 U.S.C. 2.

[3] Respondent himself rejected the applicability of the "fair use" doctrine in the instant case when, at the very outset and before knowing what portions and how much the Petitioner wished to quote, he refused permission to Petitioner "to quote" even in part. R. 68.

[4] *Report of Register of Copyrights, supra*, at p. 24.

[5] Smith, Copying of Literary Property, 30 LIBRARY J. 23, 24 (Jan. 1, 1955).

Office and author of its Special Study on "Fair Use", writes: "Fair use is not a predictable area of copyright law." [6] The Court of Appeals for the Second Circuit has called it "the most troublesome problem in the whole law of copyright." [7] The Executive Director of the Copyright Society of the U.S.A. and editor of its *Bulletin*, Walter Derenberg,[8] states that the term "defies definition." [9]

(b) "Fair use" too undependable

Reliance on "fair use" can be an exercise in futility or even worse, merely buying a law suit, since "there is no yardstick . . . whereby to measure what is and what is not fair use in any particular case." [10] The public's right to know is thwarted because there is no way for either author or publisher to know how much can be used or quoted under the "fair use" doctrine.[11] Even where "fair use" seems reasonably applicable, it is dangerous to request the author's permission (in the event of refusal) and equally dangerous not to obtain such consent. For example, the following advice appears in a copyright manual for publishers, authors, and literary agents:

"'Fair use' is a ticklish subject. Unless you want to run the risk of spending time and money defending your right of 'fair use' (and few publishers do), it is much the safest policy to get the author's consent." [12]

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[6] Lattman, *op. cit supra*, at 14.

[7] Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661, 662 (2d Cir. 1939).

[8] Derenberg, comments on Lattman study, *op. cit. supra*, at 39.

[9] Needham, *Tape Recording, Photocopying and Fair Use*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 6, p. 75, 77, 80 (1959). See also Cohen, *Fair Use in the Law of Copyright*, id., 42, 52.

[10] Smith, *op. cit. supra*, note 2, at 256.

[11] SEIDEL, WHAT THE GENERAL PRACTIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS 138-39 (1959); Cohen, *op. cit. supra*, at 68.

[12] NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS AND AGENTS 187 (1956).

Elsewhere the same manual advises that "If permission is asked and refused, however, it is most unwise to use the material, whether the use be fair or not." [13] The present case is ample evidence of the wisdom of this latter advice.

The practical undependability of "fair use" is further illustrated in the recent experience of a scholar who wrote a work including brief quotations from copyrighted materials. The scholar's sad conclusion, as set forth in the *Bulletin* of the American Association of University Professors, is that in actual experience one must abandon reliance on "fair use" unless he is willing to risk lawsuits and lose his publisher.[14]

It is not without good reason that the Copyright Office advises authors, in effect, to ignore "fair use" and instead to obtain permission or else seek legal advice.[15] Poor protection, this, for the public's *right to know*.

(c) "Fair use" too limited

The limited applicability of "fair use" demonstrates its complete failure to protect the public's right to know.

(i) No commercial use. The Constitutional right of Free Press is not forfeited because the press may profit by the exercise of its right. On the other hand, "fair use" is denied to anyone who desires merely to quote material with commercial motives, irrespective of the harm thus done to the public's *right to know*. The bellwether statement of this basic limitation comes from Mr. Justice Story, sitting on circuit, when he set forth criteria for the doctrine as "the objects of the selection made, the quantity and value of the materials used and the degree in which the use may prejudice the sale, or diminish the profits, or supercede the objects, of the original work." [16]

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[13] *Id.* at 93.

[14] Houghton, *Let's Make Fair Use of "Fair Use"*, 47 A.A.U.P. BULLETIN 56 (Spring 1961).

[15] Copyright Office, Bull. No. 20, *supra*, ¶5.

[16] Folsom v. Marsh, 9 Fed. Cas. 342, 348, No. 4901 (C.C.D. Mass. 1841). In the instant case the court below remanded to the District

The Register of Copyrights recently outlined four criteria for "fair use" and concluded that "the fourth one—the competitive character of the use—is often the most decisive." [17] Ball has said that, "the use of a quotation from a copyrighted work for a profitable commercial purpose, as distinguished from professional motives, is not a fair use", [18] and Judge Yankwich wrote that if "the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, *regardless of quantity*, is unfair." [19]

Is "fair use", under such rule of law, of any help at all to daily newspapers, weeklies, radio and TV, or book publishers? All these media are commercially motivated in our free enterprise society; they are, of course, in business to make a profit and necessarily "to derive a commercial benefit". Would they be entitled to "fair use" under the above-stated rule?

Even if the "fair use" rule were applicable to the instant case, it is poor solace indeed either to a claimant of the Constitutional right of Free Press or to the American people whose protection was intended by the right of Free Press. The founders of the Republic established the constitutional guaranty fully aware that the press of the then-budding nation was a commercial enterprise. It is reasonable to believe that they saw in such commercial motivation itself a substantial protection for the underlying purpose of the Constitutional guaranty (*e.g.*, the people's *right to know*) through competition among publishers for the attention of the American people on matters of public interest.

(ii) No substantial use. It is generally held that the use of

Court to take testimony on the questions of competitive use and substantiality of use of several of the speeches (R. 62).

[17] *Report of Register of Copyrights, supra*, at p. 25.

[18] BALL, *op. cit. supra*, at 262-63. See also JONES, COPYRIGHTS AND TRADEMARKS 66 (1949); Cohen, *op. cit. supra*, at 53; Smith, *op. cit. supra note* 5 at 25; N.Y. Tribune Inc. v. Otis & Co., 39 F. Supp. 67, 68 (S.D.N.Y. 1941).

[19] Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 209 (1954), cited with approval in Loew's Inc. v. Columbia Broadcasting System,

a substantial portion of copyrighted material is not "fair use".[20] The substantiality of the portion used is also related to its importance. According to Judge Yankwich, "the real test involves consideration of (2) the value of the quoted portion" and "the quantity and importance of the portions taken."[21] Consequently, the more important the matter in the public interest, and therefore the more of it that should be brought to the public's attention, the less the applicability of the doctrine of "fair use." No such limitation on the American public's *right to know* derives from the Constitutional right of Free press and it is not in the public interest that it should be permitted through compulsory substitution of "fair use" for the Constitutional right of Free Press.

(3) "Fair use" no substitute for Constitutional right of Free Press

Respondent would relegate Freedom of Press to the role of a non-statutory exception to the Copyright Act. Gone would be the public's *right to know;*[22] gone the safeguard of "the widest possible dissemination of information from diverse and antagonistic sources";[23] gone the "right of freely examining public characters and measures, and of free communication thereon";[24] gone the protection for "dissemination of con-

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131 F. Supp. 165, 176 (S. D. Calif. 1955), *aff'd sub. nom.* Benny v. Loew's Inc., for reasons stated by District Judge, 239 F. 2d 532 (9th Cir. 1956), *aff'd per curiam* by equally divided Court, 356 U. S. 43 (1958).

[20] See note 18 *supra;* Toksvig v. Bruce Publishing Co., 181 F. 2d 664, 666-67 (7th Cir. 1950); *Report of Register of Copyrights, supra,* at p. 24; Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 350 (S. D. Calif. 1955).

[21] Yankwich, *op. cit. supra,* at 208, 213.

[22] See H. Rep. No. 1758, 85th Cong., 2d Sess. 17 (quoted in Petition in No. 649, Oct. Term, 1960, at p. 25).

[23] Associated Press v. United States, 326 U. S. 1, 20 (1945).

[24] 6 Writings of James Madison 398 (1906 ed.).

troversial information which the public is entitled to receive" ;[25] —gone, as *Constitutional* rights,[26] all these and other attributes of a Free Press, to be replaced by an undefined, undependable and highly limited doctrine of "fair use". Respondent utterly fails to give any legal justification for thus eviscerating the First Amendment's guaranty of Freedom of Press.

Whatever the applicability of "fair use", Petitioner is also entitled to its Constitutional right of Freedom of Press.

C. American Press concerned about decision below.

Respondent seeks to give the impression that the case is of no concern to the American press.

Among the many newspapers that have editorially opposed the Respondent's position in this very case are the following: [27]

Washington Post, of the District of Columbia
Des Moines Register, of Iowa
Hartford Courant, of Connecticut
Portland Journal, of Oregon
Raleigh Times, of North Carolina
Dallas Morning News, of Texas
Spokane Spokesman-Review, of Washington
Buffalo News, of New York
Honolulu Star-Bulletin, of Hawaii

Moreover, leaders of the press and of the journalistic profession have objected to the Admiral's copyrighting of these very speeches. The nation's largest professional journalistic society, Sigma Delta Chi, composed of some 20,000 publishers, editors and newsmen embracing all kinds and ranks of jour-

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[25] United States Government's Brief before this Court, quoted in Petition in No. 649, October Term, 1960, at pp. 24-25.

[26] "Fair use" is only a privilege and not a right, Recent Decisions, 3 VILL. L. REV. 381, 383 (1958). Furthermore, it is not even a question of law but one of fact, Eisenschiml v. Fawcett Publications, Inc., 246 F. 2d 598, 604 (7th Cir. 1957), *cert. denied* 355 U. S. 907 (1957).

[27] SCHNAPPER, CONSTRAINT BY COPYRIGHT 89n, 110n, 133-39 (1960).

nalism, sought to file a brief *amicus curiae* in the Court of Appeals, in opposition to the Admiral's position; it was denied permission because of the Admiral's refusal to consent thereto. Mr. V. M. Newton, Jr., Managing Editor of the *Tampa Tribune* and Chairman of Sigma Delta Chi's Freedom of Information Committee, wrote directly to Admiral Rickover, expressing "great concern" and "fear" because of the restrictions on the press (R. 91-92). These, and the views of many other leading editors and of officials of the American Society of Newspaper Editors,[28] indicate the great concern of the American press with the Admiral's attempt to copyright his public speeches.

II. OTHER ERRONEOUS CLAIMS BY RESPONDENT

A. Questions of law involved.

Respondent urges that "factual findings" of the two courts below should not be disturbed. The "two court rule" simply does not apply here. There is not a single disputed issue of fact in the record of this case. What *is* involved is the *legal* consequence of the undisputed facts, which raises questions of law that are traditionally subject to appellate review.

This same erroneous claim by Respondent was briefed in Petitioner's Response in No. 739, October Term, 1960, at pages 2-4, to which the Court's attention is respectfully directed.

B. United States Government's Role

Respondent hopes for advantage from the Government's failure to protect the public character of these speeches (Respondent's Brief, p. 10). This very failure or refusal of the Government to prevent Respondent's illegal behavior, and the Government's participation in this behavior via improper issuance of copyright registration, has deprived Petitioner of his constitutional rights of Freedom of Press (Petitioner's Brief,

[28] *Id.* at 140.

pp. 56-57), and has, to use Respondent's own words, "muzzle[d] the Washington publisher in the free exercise of a right . . . to print anything it desires to print" (Respondent's Brief, pp. 51-52).

Respondent expresses dismay that Petitioner's claim of freedom of access to officially released Government publications "is equivalent to insisting that it obtain its source material free of charge" (Brief, p. 52). Such is precisely the intended meaning and designed effect of the Copyright Law, 17 U.S.C. 8, and the Printing Law, 45 U.S.C. 58, where Congress provided that "Government publications" could not be copyrighted and must be in the public domain. Such also is precisely the meaning of Freedom of Press, guaranteed by the First Amendment, in these circumstances. It means that publicly-released *public* documents must be publicly available to all (assuming no issue of national security or executive privilege). Only this Court can give protection and vitality to this fundamental statutory and constitutional principle, so roundly scorned by Respondent and quietly ignored by the Government in this case.

Respondent's effort to take heart from the Government's inaction must fail for two reasons:

(1) Respondent's claim flies directly in the face of the principle enunciated by this Court that "any error by the Department in the interpretation of the statute cannot confer legal rights inconsistent with its express terms," *Ewart v. Bluejacket*, 259 U. S. 129, 138 (1922); *Prosser v. Finn*, 208 U. S. 67, 74 (1908).

It is a well-established rule of law, frequently stated by this Court, that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," *Utah Power and L. Co. v. United States*, 243 U. S. 389, 409 (1917).[29]

(2) Respondent's view is that his illegal behavior as a

[29] See also United States v. San Francisco, 310 U. S. 16, 32 (1940);

Government official is waived merely because it is not stopped by the Government, whether out of oversight, disinterest or for other reasons. Such a doctrine, fraught with mischief and contrary to this Court's rulings, has been rejected by the United States Government itself. The Government's views were stated in its brief before this Court submitted last term in the Dixon-Yates case, *United States v. Mississippi Valley Generating Co.*, 364 U. S. 520 (1961):

> "No official is authorized to make exemptions . . . What they were powerless to do directly could not be accomplished indirectly by acquiesance in, or condonation of, or ignorance of violations of the law. [p. 65] . . . We submit that there is nothing cynical in an attempt by the United States to vindicate important statutory rights—vital to the conduct of the Government—of which it was mistakenly deprived by law misinterpretation of law by its own officials. Congress itself has established a governing standard not to be mitigated by the individual views of any public servant." [p. 67]

C. Dubilier Case on patents is inapplicable

Respondent cites a patent case, *United States v. Dubilier Condenser Corp.*, 289 U. S. 178 (1933), which is inapplicable to the present case for at least four reasons: (1) patents and copyrights are basically different; (2) they contain different statutory bases applicable to Government officials; (3) *Dubilier* is moot; and (4) Respondent comes without "clean hands".

This issue was briefed in Petitioner's Response in No. 739, October Term, 1960, at pages 5-10, to which the Court's attention is respectfully called.

D. Autobiographical memoirs not germane

Respondent seeks refuge in the fact that other military

Wilbur Nat. Bank v. United States, 294 U. S. 120, 123, 124 (1935); United States v. Stewart, 311 U. S. 60, 70 (1940). *Cf.* Federal Crop. Ins. Corp. v. Merrill, 332 U. S. 380, 384 (1947).

officers have written books that were privately copyrighted without being "formally questioned" (Brief, p. 29).

Several observations are relevant:

(1) Without intending at this point to characterize the books so noted by Respondent, Petitioner believes that Respondent has thus highlighted one of the critical public issues inherent in this case, the vast system of both conscious and unconscious evasion of statutory restrictions on the copyrighting of "Government publications" which has been practiced by Government agencies, by their officers and employees, and by Government sponsored private agencies operating under contract with the Government. In the Petition for a Writ of Certiorari, No. 649, October Term, 1960, this matter was discussed at pages 18-22, with various illustrative appendices appearing at pages 53-60. Many examples were given there of the private copyrighting of unquestionably official documents (e.g., pp. 53-55).[30]

The very existence of a widespread practice of private copyrighting of "Government publications" requires a decision of this Court which not only will settle the instant case but will also serve the general public interest by ending the continuing erosion of statutory and constitutional requirements.

(2) Petitioner does not claim that every writing by a Government official is a "Government publication". Merely because Pulitzer-prize winning poet Edwin Arlington Robinson worked in the U. S. Customs did not make his poetry a "Government publication", nor did Charles Peirce's many years of government service with the U. S. Coastal and Geodesic Survey thereby convert his seminal writings on pragmatic philosophy into a "Government publication." Nor for that matter—with apologies for personal reference to a few examples of public statements or writings by members of this Court—do "Government publications" result from the release of the Chief Justice's address on medical science, the relationships between

[30] *Query*, whether Respondent's Brief (p. 47, last paragraph) has not added another example within the area of his own official concern?

Federal and State Governments, and the international scene, which he delivered at a university research institute; or from Mr. Justice Clark's speeches on traffic safety, Mr. Justice Frankfurter's *in memoriam* of a distinguished American philosopher who was his roommate, Mr. Justice Whittaker's speech at a college commencement, or Mr. Justice Douglas's books on foreign culture or mountain climbing. Petitioner's main Brief suggests the tests which, in its judgment, determine when a Government official's writing becomes a "Government publication", and these tests do not apply to such writings by Government officers.

With this important distinction in mind, let us look at the books referred to by Respondent (R. 109-110). Substantially all of them were highly personal and autobiographical *memoirs* usually written and published years after the events described. For example, General Omar Bradley, in *A Soldier's Story*, wrote in 1951, after the campaigns of World War II had become history, that these "reminiscences" were his "memoirs" (p. vii); his "Acknowledgement" gave full notice "that this is in part a book of opinion and that the opinion is my own" (p. viii).[31] General Eisenhower described his *Crusade in Europe* (1948) as "a single narrative of my experiences" (480).[32] General Clark spoke of his *Calculated Risk* (1950) as an effort to "explain to my wife what had happened, to give her a better idea of how I felt about people and events . . ." (p. 4)[33] Admiral George Dufek's *Operation Deep Freeze* (1958) told "the way I felt about them" (p. v). Generals

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[31] H. W. Baldwin's review of Bradley's book calls it "subjective . . . full of chit chat", N. Y. TIMES, June 17, 1951, p. 1.

[32] Brinton's review says: "These are General Eisenhower's personal memoirs", 31 SAT. REV. LIT. 9 (Nov. 20, 1948). THE BOOK REVIEW DIGEST for 1948 describes the book as "General Eisenhower's personal narrative" (p. 241). The U. S. QUARTERLY BOOKLIST says: " . . . General Eisenhower has written a political testament . . . ", vol. 5, p. 22, March 1949.

[33] A reviewer describes Clark's book as "memoirs", Marshall, 33 SAT. REV. LIT. 10 (Oct. 21, 1950).

Henry Arnold and Ira Eaker, in *This Flying Game* (1938), include in their Preface (p. xix) a specific disclaimer of official status or opinion, a practice also followed in Admiral George Dufek's *Twenty Million Tons Under The Sea* (1956) (facing the title page), and *Clear the Decks* (1951) (p. v).[34] *General Kenney Reports* (1949) bore a subtitle "*A Personal History of the Pacific War.*"

Two other books mentioned by Respondent are of somewhat different nature. *MacArthur on War* (1942) was edited and copyrighted by Waldrop who wrote an original introduction, three full chapters, an appendix and two supplementary tables for the book. The General's material in the book was taken almost wholly from his uncopyrighted testimony before Congressional committees and his uncopyrighted Annual Reports as Army Chief of Staff. Of Admiral Alfred T. Mahan's *The Influence of Sea Power Upon History, 1660-1783*, two comments are appropriate: (1) it was published in 1890, prior to the enactment of the Printing Law of 1895 and the Copyright Law of 1909; and (2) it dealt with matters over 100 years old.

The books referred to by the Respondent are, thus, not germane to the instant case. For the most part they were highly personalized and autobiographical in nature, and in some instances self-exculpatory. Their authors neither purported to be, nor did their then-held positions make it appear that they were, writing in an official capacity. Here, on the contrary, Respondent did purport so to speak. In other instances cited, it is clear from the works that their authors were writing unofficially because of the manifest personal and autobiographical form of the *memoirs*. In the instant case, exactly the opposite was true; Respondent specifically refused to disclaim official status[35] and used every form of official *imprimatur*

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[34] This book was described as "personal narrative", Book Rev. Dig. 1951, and as a "memoir", 27 New Yorker 187 (Nov. 17, 1951).

[35] Respondent's Brief (pp. 39-40) shows solicitous interest in the need to comply with the *second* sentence of ¶3 of Article 1252, Navy's

by which the Government traditionally conveys to the press and to the American people the official status of such materials.

Furthermore, even if the books could be deemed validly applicable to the present case, which is not the situation, none of them had received judicial sanction. Long-repeated violation of law does not invoke legitimacy upon the violation. *Brown v. Board of Education*, 349 U. S. 294 (1954); *Cooper v. Aaron*, 358 U. S. 1 (1958). Cf: *United States v. E. I. duPont de Nemours*, 366 U. S. 316 (1961).

E. Official status of Government press releases

Respondent seeks to evade the official ruling by the U. S. Superintendent of Documents, the Library of Congress, the American Library Association, and others, that an official departmental press release is a "government publication" [see Petitioner's Brief, p. 17], by claiming that "the important thing" is that the releases here in question were not listed in the Monthly Catalog of Government Publications (Respondent's Brief, p. 42).

The Respondent is misinformed as to the practice of the Superintendent of Documents. The latter has officially stated that official press releases are "government publications" but he has also announced that his *Monthly Catalog* will *not* list each such press release. In his initial announcement in 1936 that the *Monthly Catalog of United States Government Publications* would thereafter identify official Government press releases as "government publications", the Superintendent of Documents noted that because of their ephemeral character they would not be individually listed in the *Monthly Catalog*:

General Regulations [requiring submission of copies of all writings], and disdainful disregard for the equally peremptory requirements of the *first* sentence of the same ¶3 [requiring disclaimers for private opinions]. For text of Regulations, see R. 104. Furthermore, could not the solicitude about submitting copies of his speeches have been satisfied by copies that were not official press releases, as was done when copies were submitted to the Copyright Office? (See Petitioner's Brief, ¶3e, page 4).

"It is true that many of these publications both because of the type and paper, are not, in all probability, of permanent value. However, it is considered that since the information given is often the result of careful research, *the public is entitled to know of its existence. Many of the departments and bureaus issue material for the press in this form.* Unless it is issued regularly or in a numbered series, no entry will be made in the Monthly Catalog for such publications since it is considered that that information will be obtained in newspapers and other current periodicals". *Monthly Catalog of U. S. Public Documents*, January 1936, p. 3. (emphasis added)

Twice annually, in February and August of each year, the *Monthly Catalog* includes an Appendix which notes the existence of periodicals, press releases and statistical statements, even although it does not list each publication therein. A standard notation with respect to press releases, for example, is the one appearing in relation to the Atomic Energy Commission, Respondent's employer and one of the government agencies which issued official press releases of many of the speeches here in question. In both the August 1955 issue (just prior to Respondent's first speech) and the February 1961 issue of the *Monthly Catalog* the following notice appeared. The form is from the February 1961 issue, at page 85:

"Releases.

"Note.—These entries are listed for informal purposes only. Because of their ephemeral nature, they are not individually classified and catalogued by the Library of the Division of Public Documents. They are kept in the Library on a temporary basis.

"11892. Press Releases. various paging. 4°. [Issued irregularly. Processed.] Y3.At7:33(date)"

Thus, although for purely administrative reasons official press releases are not individually listed or catalogued in the *Monthly Catalog*, they are, of course, "Government publications."

CONCLUSION

For the foregoing reasons, and for the reasons presented in our main Brief, the judgment of the Court of Appeals should be reversed in No. 36 and affirmed in No. 55 (to the extent it is necessary to reach this latter issue).

Respectfully submitted.

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tober, 1961